80-1398

No.

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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in the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN DOE, and
MARY DOE,
Petitioners

vs.

WILLIAM GOLDMAN,
HALIM MITRY,
THEODORE I. ANDERSON,
WILFRED BLOOMBERG,
JACK EWALT,
AXEL HOFFER, and
JOHN NELSON
Respondents

Petition for Writ of Certiorari to the
U.S. Court of Appeals for the First Circuit.

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Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Do parents of an unemancipated minor patient or former patient of a State mental hospital have a constitutional affirmative, assertive right to be given medical reports, advice and related information about their child's condition and need for continuing psychiatric or medical services, where the purpose is to enable the parents to provide for the care and welfare of the child after hospital treatment has ended?

2. Where State psychiatrists discharge the minor from their care and treatment, but under color of State law they refuse to give medical reports, advice or any information about their diagnosis, treatment or prognosis to the parents, and as a result the child has a relapse, becomes hostile and severs all contact with the parents, does the limitation period on the parents' civil rights action run from the time of the refusal or from the time that their damage first becomes apparent?

3. If the applicable federal limitation period is related to the State limitation most nearly analogous to their claim, in pleading a prima facie civil rights case do the parents have the burden of alleging facts to show that all possibly applicable analogous State limitation periods have not expired, in order to foresee and avoid any expired limitation period which is applied?

4. Where the parents filed a prima facie civil rights action, as defined in Gomez v. Toledo, 446 U.S. (1980), 100 S.Ct. 1920, was the court below correct in affirming dismissal of the complaint on the ground that the applied limitation period had expired and that the parents were not entitled to show that the applied limitation period had been tolled by the absence of certain defendants from the State?

LIST OF ALL PARTIES

The following is a list of all parties to the proceedings in the United States Court of Appeals for the First Circuit, whose judgment is now sought to be reviewed:

Plaintiffs-Appellants

JOHN DOE

MARY DOE

Defendants-Appellees

WILLIAM GOLDMAN

HALIM MITRY

THEODORE I. ANDERSON

WILFRED BLOOMBERG

JACK R. EWALT

AXEL HOFFER

JOHN NELSON

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS IN COURTS BELOW

Actions of courts below were not reported.

TABLE OF CONTENTS

Page

Questions Presented for Review.....i

List of all Parties.....iii

Reference to Official Reports.....iii

Table of Contents.....iv
Table of Authorities Cited.....v
Table of Statutes Cited.....vi

Jurisdiction.....vii

Statutes Involved--Verbatim.....viii

Concise Statement of the Case.....1

Basis for Jurisdiction of the Court of First Instance.....18

Argument.....19
Introduction.....19
Parental Constitutional Rights.....24
Parental Statutory Rights.....36
The Applicable Limitations Period....42
Start of the Limitation Period.....45
Procedural Anticipation of Defenses 52
Procedural Right to Amend.....57
Summation.....61

Appendix
Trial Court Memorandum and Order, 20 May, 1980.....A-1
Trial Court Order of Dismissal.....A-26
Plaintiffs' Motion to Vacate Judgment.....A-27
Court of Appeals' Opinion, 3 November, 1980.....A-54
Court of Appeals' Judgment, 3 November, 1980.....A-58
Petition for Rehearing.....A-59
Court of Appeals' Memorandum and Order, 19 November, 1980 denying rehearing.....A-79

TABLE OF AUTHORITIES CITED

Pages

Addington v. Texas,
441 U.S. 218 (1979).....24, 27

Belloti v. Baird, 433 U.S. 622 (1979)....25

Cannon v. Sears, Roebuck, & Co.
374 N.E. 2d 582 (1978).....47

Franklin v. Albert,
Mass. Adv. Sh. (1980) 2187.....16, 47

Gomez v. Toledo,
446 U.S. (1980).....15, 22,
100 S.Ct. 1920 ...23, 40,
...54-57, 61, 62

O'Connor v. Donaldson,
442 U.S. 563 (1975).....24

Parham v. J.R.,
442 U.S. 584 (1979).....26-28, 30, 50

Planned Parenthood v. Danforth,
428 U.S. 52 (1976).....25

Roe v. Wade, 410 U.S. 113 (1973).....26

Teller v. Schepens,
Mass. Adv. Sh. (1980) 2199.....16, 47

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975).....27

Zenith Radio Corp. v. Hazeltine
Research, Inc., 401 U.S. 321 (1971)..60

TABLE OF STATUTES CITED

Pages

28 U.S. Code 1331 and 1343.....18

42 U.S. Code 1983.....18, 20-23, 38, 55, 62

Massachusetts General Laws

Chapter 123
- Section 32.....2, 43, 65
- Section 36.....5-7, 9, 39, 51

Chapter 260
- Section 1, Fifth.....2, 43, 53
- Section 2A.....45
- Section 4.....45
- Section 9.....57, 59
- Section 12.....53

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit, here sought to be reviewed, was entered on 3 November 1980, affirming the dismissal of the complaint by the trial court.

The Court of Appeals denied a timely filed petition for rehearing by a memorandum and order dated 19 November 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Title 42, U.S.C., Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.....,.....

Massachusetts General Laws, Chapter 123

Section 32. Charges for Care of Patients; Rates; Recovery.

The Department may make charges for the care of any person in its facilities at rates established by the rate setting commission under sections thirty K to thirty P, inclusive, of chapter seven. The charges may be recovered from said person, his guardian or conservator, from the husband or wife of said person, from his father or mother if he is a minor, or from his child over twenty-one years of age if of sufficient ability; provided, however, that said person shall be entitled to retain one thousand dollars in cash or personal property.

Section 36. Departmental Records of Persons Admitted to Its Facitities. as amended

The department [of Mental Health] shall keep records of the admission, treatment and periodic review of all persons admitted to facilities under its supervision or the I.C.U. Such records shall be private and not open to public inspection except (1) upon proper judicial order whether or not in connection with

Mass. General Laws, Chapter 123, (continued)
Section 36. (continued).....
pending judicial proceedings, (2) that the commissioner shall allow the attorney of a patient or resident to inspect records of said patient or resident if requested to do so by the patient, resident or attorney, and (3) that the commissioner may permit inspection or disclosure when in the best interests of the patient or resident as provided in the rules and regulations of the department. This section shall govern the patient records of the department notwithstanding any other provisions of law.

Massachusetts General Laws, Chapter 260
Section 1. Limitation of Twenty Years.
The following actions shall be commenced only within twenty years next after the cause of action accrues:
First,-----
Second,-----
Third,-----
Fourth,-----
Fifth, Actions under section thirty-two of chapter one hundred and twenty-three to recover for the support of inmates in state institutions.

Section 2A. Limitation of Three Years in Certain Cases.
Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

Section 4. Limitation of Three Years; Limitation of One Year for Certain Action.
Actions of contract or tort for malpractice, error or mistake against

Mass. General Laws, Chapter 260,(continued)
Section 4,(continued).....
physicians, surgeons, dentists, optometrists, hospitals and sanitoria,' actions for assault and battery, false imprisonment, slander, libel, actions against sheriffs, deputy sheriffs, constables or assignees in insolvency for the taking or conversion of personal property, actions of tort for injuries to the person against counties, cities and towns, and actions of contract or tort for malpractice, error or mistake against hairdressers, operators and shops registered under sections eighty-seven T to eighty-seven JJ, inclusive, of chapter one hundred and twelve, actions of tort for bodily injuries or for death the payment of judgments in which is required to be secured by chapter ninety and also actions of tort for bodily injuries or for death or for damage to property against officers and employees of the commonwealth, of the metropolitan district commission, and of any county, city or town, arising out of the operation of motor or other vehicles owned by the commonwealth, including those under the control of said commission, or by any such county, city or town, suits by judgment creditors in such actions of tort under section one hundred and thirteen of chapter one hundred and seventy-five and clause (10) of section three of chapter two hundred and fourteen and suits on motor vehicle liability bonds under section thirty-four G of said chapter ninety shall be commenced only within three years next after the cause of action accrues.

For the purposes only of this section, an officer or soldier of the military forces of the commonwealth, as defined in chapter thirty-three, shall while performing any lawfully ordered military

Mass. General Laws, Chapter 260, (continued)
Section 4, (continued).....
duty be deemed to be an officer or employee of the commonwealth.

Section 9. Suspension in Case of Non-Resident Defendant.
If, when a cause of action hereinbefore mentioned accrues against a person, he resides out of the commonwealth, the action may be commenced within the time herein limited after he comes into the commonwealth; and if, after a cause of action has accrued, the person against whom it has accrued resides out of the commonwealth, the time of such residence shall be excluded in determining the time limited for the commencement of the action; but no action shall be brought by any person upon a cause of action which was barred by the laws of any state or country while he resided therein.

Section 12. Extension of Time in Case of Fraudulent Concealment.
If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action.

CONCISE STATEMENT OF THE CASE

In June 1972, John Doe applied to have his daughter Jane, then 13 years old, voluntarily admitted to Massachusetts Mental Health Center, a State-run mental hospital at Boston. He informed the staff psychiatrists that Jane's mother had died in 1970, that Jane's mother had died by suicide and that Jane was aware of that fact, that he had remarried and his new wife Mary Doe was a widow with her own children who had come to live with him as a part of his family, that Jane had been suffering severe depression and extreme behavioral symptoms which were obviously related to her mother's death, and that Jane had been under the care of a private psychiatrist who had advised immediate hospitalization for Jane.

Jane was admitted to the hospital on John Doe's application and the Department of Mental Health notified him that he would be held responsible for the charges for

Jane's treatment pursuant to Mass G.L. c.123, sec.32.

The statute of limitations which specifically applies to Mass. G.L. c.123, sec.32, is found at Mass. G.L. c.260, sec.1, Fifth, and is twenty (20) years.

After Jane was hospitalized for seven (7) months, she was discharged into her parents' custody and care. The parents were given no medical reports, no professional guidance or other information about Jane, either before or after her discharge. Jane again began to exhibit the same severe behavioral symptoms that had caused her private psychiatrist to recommend hospitalization and the parents notified the hospital psychiatric staff of this fact. The parents asked for professional guidance about how to be supportive of Jane and about how they could provide what Jane needed in order to resolve her emotional problems in a normal family and

school environment outside of the hospital. The respondents, including the treating psychiatrist, supervisory psychiatric staff and officials of the Department of Mental Health refused to give any medical reports, guidance or information to the parents, basing their refusal solely on hospital policy.

The refusal to give medical reports, professional advice or any other information to the parents was not based on any determination made about John Doe or Mary Doe. The respondents made no judgment that Jane would or might be harmed in any way if her parents were given a medical report or advice about how to help her. Their refusal was based solely upon an abstract "hospital policy" that families should not be told about a patient or former patient because of the "potential harm that can result from misunderstanding of medical terms." At the time, respondents knew that John Doe was a lawyer with two academic

degrees, and they had been told that he could understand medical terms or could be expected to ask questions in order to understand.

In 1973, Jane's behavior worsened and her parents placed her in a private school to help her while they continued to try to obtain medical reports and advice from the respondents. John Doe filed suit to obtain vested personal trust funds of Jane for the purpose of paying for her private schooling and for further psychiatric care. In that litigation, which the trustee resisted, Jane's past condition, her past treatment, and a diagnosis and opinion about her need for more psychiatric care were all essential proof in the case. The respondents knew about the litigation and its purposes, but they refused to give any medical reports, advice or information to John Doe even for his use in that case, still basing their refusal on the same hospital policy previously relied on.

While Jane was at private school, her condition seemed to improve because in 1974 she asked to be legally adopted by her stepmother Mary Doe. Jane was adopted by Mary Doe in September 1974. In the meantime, John Doe continued to seek medical reports, advice and information from the respondents so that Jane could be helped to improve, but the respondents continued to refuse to give them.

Finally, John Doe requested the right to inspect Jane's medical records in his capacity as father-attorney, pursuant to Mass. G.L. c.123, sec.36, as amended. The matter was referred to the Legal Counsel of the Department of Mental Health, who provided proper Departmental forms of consent, which Jane freely signed for the purpose. She was then 15 years old.

The respondents were then advised by their own Departmental Legal Counsel that John Doe was entitled by statute and

regulations to inspect and copy his daughter's medical records. Respondents still refused to allow John Doe to inspect, despite the opinion of their own appointed counsel, on the grounds of their own "policy" not to disclose information to any parent of a patient or former patient, even though the parent had a direct need for the information both as an attorney and as a parent, in order to care for the child.

In refusing to comply with the provisions of Mass. G.L. c.123, sec.36, respondents never sought from the Attorney General of Massachusetts or from any other qualified legal adviser a legal opinion which would have overridden the advice of their own Departmental Legal Counsel and would have supported their action. Neither did the respondents institute any administrative or judicial proceeding to legitimize their action by due process of law, at which the parents could assert their rights.

Respondents simply refused to comply with the law as it had been interpreted for them by their own legal counsel, leaving the parents with no recourse except independent collateral litigation to compel them to obey the law. At that time, Mary Doe was already the mother of Jane, by adoption.

In late 1974, when the respondents refused to comply with Mass. G.L. c.123, sec.36, the situation with Jane still seemed to be under control, and although the parents were worried, the relationship with Jane still seemed to be intact even though it was precarious. Although the respondents had acted under color of State law to deprive the parents of their constitutional rights to medical reports and to disclosure under Mass. G.L. c.123, sec.36, the parents had not suffered any apparent injury thereby. However, the parents foresaw that Jane might be injured if they did not obtain the medical reports, guidance and information they sought, because if

they could not have that information to establish that Jane had a need for trust funds, they would not be able to obtain funds. If they could not obtain trust funds to help Jane, she might have a relapse and return to the condition that had previously caused her to be hospitalized, with further expense and stress placed on them and their family. Accordingly, in 1974, John Doe filed suit to obtain a declaratory judgment from the Supreme Judicial Court of Massachusetts that they and all parents of minor patients have federal and state constitutional rights to be given medical reports, advice and information, and that John Doe as an attorney-parent had a statutory right to inspect and copy Jane's medical records. The only remedies sought in the case were (1) declaratory judgment, (2) mandamus, and (3) damages limited to attorney's fees and expenses connected with the bringing of the litigation.

The Supreme Judicial Court in due course

ruled in the case, confirming the opinion of their Department Legal Counsel that respondents had rejected. However, the court did not address the constitutional issues at all. It limited its decision to a ruling on the meaning of Mass. G.L. c.123, sec.36. It held that respondents under the statute had no personal or official discretion to refuse to permit John Doe to inspect Jane's medical records. But, because the court issued its judgment a few months after Jane had reached her 18th birthday, it held that since Jane was now an adult, Jane would have to sign a new consent before her father would be entitled under the statute to inspect her records. The court thus ruled on the meaning of the statute as of the date of its judgment, rather than as of the time of the respondents' refusal to comply with the statute.

After the suit for declaratory judgment had been filed in the Supreme Judicial Court, but before that case was decided,

Jane suffered a relapse and in the absence of funds from her trustee and without medical reports, advice or information from the respondents, the parents' efforts to resolve Jane's problems became less and less effective until, finally, Jane ran away and severed all contact with the parents. However, until the Supreme Judicial Court declined to rule on the constitutional issues and interpreted the statute only as it applied after Jane reached majority, the parents believed and acted upon the basis that the loss of contact with Jane was the result of her problems, was correctable and caused primarily by their lack of knowledge about what to do to help Jane regain mental health. When the Supreme Judicial Court in 1977 abstained from deciding the constitutional issues and held that a new consent from Jane would be required, the parents for the first time were placed in the position of permanently being unable to obtain medical reports, advice or

information about Jane, and they then became aware that a permanent breach of relationship had occurred and that nothing more could be done by them to correct the situation. The breach of the relationship with Jane made it impossible to obtain Jane's consent. Without her consent, respondents were not then required by law to allow John Doe to see her medical records. Without the medical records and the information therein, the parents could not determine what would be appropriate to restore the relationship. The denial of mandatory relief and the continuing refusal of respondents to allow the parents to have any information about Jane, at that point in time, made the parents' loss permanent. The loss became real and final in 1977 when Jane reached legal majority and the Supreme Judicial Court refused to compel the respondents to give the parents what they would have been entitled to receive before that date. Jane reached her

majority in April 1977. Suit was filed in the present civil rights action in the federal district court for Massachusetts in February 1979, less than two years later.

In the prior suit before the Supreme Judicial Court, only respondents Goldman and Mitry were named as party defendants. Goldman was Commissioner of Mental Health of Massachusetts. Mitry was Chief Executive of the hospital which treated Jane. The remedy of mandamus against them would have been effective against all of the other respondents herein, who were their subordinates. However, all of the respondents herein participated in the refusals to provide medical reports, advice, information, or statutory access to medical records, and all were named in the agreed statement of facts or exhibits which were before the Supreme Judicial Court when it decided that earlier case.

The parents' complaint for civil rights

damages alleged that their constitutional rights had been violated and that they had been damaged by the respondents, and that the respondents were acting under color of State law at the time.

In response to the complaint, the respondents moved to dismiss on various grounds, namely (in pertinent part):

> a) Failure to state a claim for which relief can be granted, on grounds of res judicata and collateral estoppel.
> b) Running of the applicable statute of limitations.

The parents responded by filing a motion for summary judgment on the issue of liability, which motion was supported by affidavit and by specific reliance upon the agreed statement of facts filed in the earlier suit before the Supreme Judicial Court. Respondents filed no affidavits of fact, either in respect to their motion for dismissal or in opposition to the

parents' motion for summary judgment.

The trial court entered a memorandum and judgment granting the respondents' motion to dismiss. The parents' motion for summary judgment was not acted on. The primary basis for the judgment of dismissal was that respondents were entitled to a prima facie defense of immunity because they had exercised the parens patriae power of the State. The court also noted that the cause of the action was time barred. The parents timely moved to vacate on the grounds that the trial court had failed to construe the allegations of the complaint most favorably to the plaintiffs, and that the respondents had not shown that the parens patriae power had been properly invoked by them or that the power had been exercised in accordance with due process of law. They also argued that upon the facts alleged in the complaint, the action was not time barred. The parents asked the court to rule on their motion for summary

judgment on the grounds that their affidavit was unopposed and that the facts of the case were not in dispute.

The trial court denied the parents' motion to vacate the judgment and refused to rule on their motion for summary judgment. The parents then filed a timely notice of appeal.

On appeal, the parents relied on Gomez v. Toledo, 446 U.S. (1980), 100 S.Ct. 1920, decided after the appeal was taken. However, the court of appeals did not decide the question of whether the motion to dismiss should have been granted where a prima facie civil rights case had been pleaded. Instead, the court noted that it could dispose of the case on the ground that it was time barred by a three-year statute of limitations, which ran from the time of the respondents' refusal to provide medical reports, according to analogous Massachusetts tort limitation law. The

court affirmed the judgment below.

The parents then filed a timely petition for rehearing, citing two decisions of the Supreme Judicial Court of Massachusetts which had been handed down after briefing and oral argument were closed in the appeal. Those cases, Franklin v. Albert, Mass. Adv. Sh. (1980) 2187, and Teller v. Schepens, Mass. Adv. Sh. (1980) 2199, announced a landmark change in the application of the statute of limitations to medical malpractice cases. Those cases departed from past decisions which held that the limitation period ran from the malpractice, regardless of when discovered; and instead held that in such cases the limitations period can begin to run only from the time when the plaintiff learns or reasonably could learn of his injury.

In their petition for rehearing, the parents also asked for an opportunity to show that the applicable limitations

period chosen by the court in fact had not expired because at least two (2) respondents were served outside of Massachusetts and as to them, because of nonresidency, the limitation period was still tolled. One such respondent was the former Commissioner of Mental Health, Goldman. The other was the former superintendant of the treating hospital, Ewalt.

The court of appeals entered a memorandum and order denying the petition for rehearing. It did not change its view as to the time that the limitation period had started to run, holding that

> "The fact that plaintiffs might not have realized until later that defendants rejection of their rights, if any, might have greater consequences than they anticipated, might affect the damages, but does not qualify the cause of action, or create a new one." (Appendix A-79)

As to the parents' request to have an opportunity to have a factual hearing on the issue of whether the limitation period applied by the court had in fact expired or whether it had been tolled as to the

two respondents, Goldman and Ewalt, the court of appeals held that

> "Defendants showed a prima facie case with respect to the statute of limitations. The burden shifted to the plaintiffs to show that it was tolled. (citation omitted) This they did not do. Evidence that two defendants were served elsewhere outside the state does not establish that they were outside during the initial three years. Nor does Jane Doe's minority suffice; it is not her cause of action that is being pursued."(Appendix A-8

The court of appeals did not explain when in the trial court the burden shifted to plaintiffs to show that the limitations period was tolled or at what point in time the plaintiffs failed to meet the burden.

BASIS FOR JURISDICTION OF THE COURT OF FIRST INSTANCE

The jurisdiction of the United States District Court for the District of Massachusetts was invoked on the basis of 28 U.S. Code 1331 and 1343, based on claims arising under 42 U.S. Code 1983. Damages alleged against each individual defendant were in excess of $10,000.00.

ARGUMENT

Introduction

This case raises the question: Do parents who have voluntarily employed State medical and psychiatric experts to provide psychiatric treatment to their children have the constitutional affirmative, assertive right to obtain from such experts medical reports, advice and related information about the treatment given to the children, where the purpose is to enable the parents to provide properly for the care, welfare, education and upbringing of the children within their family structure?

A subsidiary issue raised within the above question is: Where State medical and psychiatric experts have established a "hospital policy" of not giving medical reports, advice or information to patients and their families because the medical terms might be misunderstood, is that policy sustainable against the constitutional rights of patients and their families as an exercise of

the State's parens patriae power without due process of law of any kind?

A second subsidiary issue raised within the above question is: Are such State medical and psychiatric experts entitled to a good faith immunity defense in a 42 U.S.C., sec. 1983 action by a parent-attorney of a minor patient arising out of the experts' refusal to make disclosures, where the State experts were specifically advised by their own official legal counsel that by statute the particular parent-attorney was entitled to inspect and copy his child's medical records, where the experts rejected that advice and the advice was later confirmed by the highest court of the State?

A second major question raised in this case is: Assuming that analogous State law will be used to determine the length of the federal limitation period to be applied to the parents' cause of action under 42 U.S.C. sec. 1983, does that period begin to run

when the State experts refuse to provide medical reports, advice or information even though no damage has yet occurred as a result of the refusal, or does the limitation period begin to run only when the parents learn or reasonably should have learned that substantive damages, cognizable under 42 U.S.C. sec. 1983, have been sustained?

A subsidiary issue raised within the above question is: Was the court of appeals correct in ruling that the parents were aware of their rights, if any, at the time that they were rejected, and therefore at the time were bound to anticipate the consequences (i.e., damages) that might flow therefrom, so the limitation began to run from that moment?

Two federal procedural questions are also raised by the within petition for certiorari, relating to the limitation period to be applied to a parental civil rights action under 42 U.S.C. 1983.

The first procedural question is: Do parents who recognize that their constitutional rights have been violated by State medical and psychiatric experts' refusal to provide reports, advice and information, but who reasonably do not see that the refusal has resulted in any presently actionable damage to them, have the burden of assuming that in any civil rights action under 42 U.S.C. sec. 1983 filed by them, the court will apply the most restrictive limitation and earliest possible running period, even though reasonable grounds exist to apply a longer, later, tolled or unexpired limitation period to the cause of action?

A subsidiary issue within the above question is: Was this Honorable Court less than clear in its decision in Gomez v. Toledo, 446 U.S. (1980), 100 S.Ct. 1920, reversing the judgment of the court of appeals for the first circuit, that only two elements are needed to make a prima facie civil rights case and that a plaintiff is not required

to anticipate defenses of any adverse party within the allegations of his complaint? In the proceedings below, the court of appeals for the first circuit has apparently qualified the ruling in Gomez, supra, by holding that in order to make out a prima facie civil rights action under 42 U.S.C. sec. 1983, a plaintiff must anticipate and avoid by affirmative allegations in the complaint all possible statutes of limitation defenses that may be raised by adverse parties. Did this Honorable Court intend that its decision in Gomez, supra, should be so limited?

The second federal procedural question in this case is: If the parents reasonably believe that an unexpired limitation period applies to their civil rights action and they plead accordingly in their complaint, but the trial court rules that upon the allegations of the complaint an expired limitation period applies, are the parents entitled as a matter of right or equity to

an opportunity to amend the complaint, to take discovery on the issue, and to have a hearing on the merits of such a statute of limitations defense, where the evidence may disclose that the limitation period began to run at a later date or was tolled so that it has not expired?

Argument - Parental Constitutional Rights

Somehow, as the field of psychotherapeutic medicine has developed and offered treatments for a vast variety of common emotional and behavioral problems, vestiges of archaic attitudes about behavioral eccentrics and emotionally disturbed persons have served to preserve and enhance the image of the psychotherapist more as an oracle, a witch doctor, a faith healer and an infallible savant, rather than as a member of a divided profession whose judgments lack certainty and are highly fallible. Addington v. Texas, 441 U.S. 218 (1979). That image is fading.

This Court, in O'Connor v. Donaldson, 422

U.S. 563 (1975), ruled that emotionally disturbed, legally competent persons have the same constitutional rights as other citizens, regardless of whether they are in or outside of mental institutions. It also held that where a legally competent, mentally ill person can survive safely in society with the help of willing family and friends, more is needed before the State may validly intervene to exercise its parens patriae power to regulate, control, or administer the affairs of that person.

The rights of children have been treated separately. In recent years, a number of cases have been handed down in respect to the rights of privacy of children, especially vis-a-vis the State and their parents. They have been framed mostly in terms of the scope of the State's and the parents' power to restrict the rights of the child, especially in birth control and abortion decision cases. Belloti v. Baird, 443 U.S. 622 (1979), 99 S.Ct. 3035; Planned

Parenthood v. Danforth, 428 U.S. 52 (1976), 96 S.Ct. 2831; Roe v. Wade, 410 U.S. 113 (1973), 93 S.Ct. 705.

Unfortunately, the rights of parents have been defined more in terms of what the State or the child may validly do to circumscribe the parents' powers, rather than in terms of the parents' affirmative, assertive powers to carry out their constitutional duties as parents. Parham v. J.R., 442 U.S. 584 (1979). Where the State, the child, or third parties (such as the respondents here) simply refuse to recognize such parental rights or to support them in the performance of their duties but take no positive actions to infringe or otherwise affirmatively deprive the parents of those rights, a serious gap exists which leaves uncertain how parents may provide care for their children. There is a vital need at this time, in order to give substance to the decisions of this Court in mental health cases where minors are involved, to define

sharply the affirmative, assertive rights of parents under the federal constitution where they need to exercise such rights in order to care for their children.

This Court has made it undeniably clear that the right of a parent to the companionship, care, custody, and management of the children that he has sired and raised is constitutionally protected. Weinberger v. Wiesenfeld, 420, U.S. 636 (1975); Parham v. J.R., supra.

It is also undeniably clear that the State has a parens patriae power which properly may be exercised to limit a parent's constitutional rights, but it is equally undeniable that a State has no valid right to exercise its parens patriae power unless and until there is proof that the child's safety and welfare are threatened. Such proof is a constitutionally required prerequisite for the valid invocation of the State's parens patriae power. Addington v. Texas, supra; Parham v. J.R., supra.

Unfortunately, Parham v. J.R., supra, does not fully deal with the problem of a parent's right to act without State intervention. There is a difference between the situation where the parent needs no State or private help in carrying out a parental decision, as compared with the situation where the only way for the parent to reach a prudent and informed decision is for him to obtain expert information which is only in the hands of State physicians and psychiatrists. In the latter situation, unless the State physicians and psychiatrists are required to respond fairly and substantially to parental demands for information, they can infringe and violate the parent's rights just as substantially as if they had affirmatively exercised improper restraints on the parent's powers and liberty.

In the present case, there was no constitutionally valid basis for the State to intervene between the parents and the child to prevent the parents from making their

own judgments about how to provide care and upbringing for Jane, and the State could not have intervened to prevent the parents from demanding and obtaining medical reports, advice or information from a private psychiatrist. It ought to follow that the State should not be allowed to intervene by negative action in refusing to supply medical reports, advice and related information which developed from the voluntary agreement of the parents and the State for State mental treatment of their child. It should be noted that in the present case the respondents never warned or stated in advance in any way to the parents that a condition of hospitalization of the child would be that the State would not give medical reports, advice or information to the parents about the child.

In the present case, the parents' problem is sharply defined. The State's constitutional interests were not involved, because no facts were alleged which would have

warranted the invocation of the parens patriae power. The child's constitutional interests, if they were involved, were not in conflict with the parents' rights, because if Jane, at 15 years of age, was an informed minor, she had given her written consent on a State-approved form to her father's inspection of her medical records. If Jane was not capable of giving informed consent, her parents were the appropriate persons to act in her behalf, since she was in their custody and control, and the medical services had been ordered for her benefit by them. Parham v. J.R., supra.

The real conflict in the present case appears to be of a kind which this Honorable Court has apparently not dealt with in its recent decisions. It is the conflict between the constitutional rights of parents and patients, on the one hand, and the powers of physicians and psychiatrists derived from their State licenses to practice medicine and psychiatry, on the other

hand. The conflict is not between opposing constitutional interests of equal magnitude. The constitutional rights are only on one side of the conflict; they belong to the parents and the minor former patient who were agreed that the parents should see the child's medical records. On the other side are the respondents, whose sole claim of right is derived from their State licenses to practice medicine and psychiatry to give advice and to offer treatment in the field of medicine and psychiatry. Petitioners respectfully submit that a State license to practice medicine or psychiatry does not give any physician or psychiatrist the power or discretion to intervene in the life of any legally competent patient and to impose his discretion and judgments on the patient without that patient's expressed or implied consent. The physician or psychiatrist does not have the power under a State license to overrule the patient's judgment or

decision about his own privacy or about his own life. He can advise, but he may not command. If the patient desires to know the truth about himself according to the physician's or psychiatrist's findings and best professional judgment, if a patient decides for reasons of his own that his family and friends should be told the truth about those findings and that professional judgment, or if the parents of an unemancipated minor patient decide that they have a parental need for medical reports, advice and related information about their child, the State license of the physician or psychiatrist does not and should not give the physician or psychiatrist the power to decide or to act otherwise, no matter what the physician or psychiatrist believes will be the effect on the patient or on the family. If the physician or psychiatrist feels that there is a present threat to the safety or welfare of any patient, his only recourse is and should be to apply

forthwith to a court of competent jurisdiction so that a remedy, if one is necessary, is invoked and applied through due process of law.

The idea that a State psychiatrist has or should have the right and power to withhold medical reports, advice or other related information from a legally competent, voluntary patient or his family, upon the premise that the patient or family might not understand medical terms and harm might result, is both inconsistent with the Bill of Rights and arrant nonsense besides. We all hear or read things we don't understand or might not fully understand, and we often are emotionally upset by what we hear or read, with or without understanding. The federal constitution protects the right to hear and read what we don't understand, and protects the right to react positively or negatively to what we hear or read, regardless of our understanding. Society has not delegated to any State-licensed

physician or psychiatrist the power to intervene in the lives of legally competent persons and to protect them from misunderstandings or negative feelings. A person who does not understand has the option of seeking information to gain understanding, including information through opinions from other experts. The liberty and personal freedoms protected by the federal constitution are not subject to the limitation that we may hear and read only what a State-licensed person decides we will not misunderstand and will not harm us.

Unfortunately, when courts in the past have rejected challenges to demands for information from physicians and psychiatrists, they have failed to see that the rights of the patients are constitutional in scope, while the rights of physicians and psychiatrists are based on their own professional opinions and on nothing else. Medicine and psychiatry are not absolute sciences.

Physicians and psychiatrists are bound to be truthful and to make disclosures as fully as are all other licensed professions. The only ones who should decide to have the medical reports withheld from themselves are the patient or the parents or guardian. No one is forced to ask for the information, and a physician or psychiatrist is always free to recommend and to try to persuade the patient or the family not to ask.

Petitioners respectfully submit that parents must necessarily have constitutional affirmative, assertive rights to compel physicians or psychiatrists to give them medical reports, advice and related information or their constitutional rights cannot be implemented in the manner needed. The issue is of national importance and needs deciding as a part of the jurisprudence which this Honorable Court has developed in its recent decisions on this subject.

Argument - Parental Statutory Rights

In dismissing the parents' civil rights action, the trial court rested its judgment primarily upon the unwarranted assumption that

> "The interests of the state, child, and the parents intertwine and conflict to an equal degree in the mental health field." (Appendix A-11)

Because that unwarranted assumption may also be seen as the basis for many past court decisions in mental health cases, the assumption should be carefully analyzed.

By holding that the interests of the state, child, and the parents intertwine to an equal degree, the court creates the basis for recognizing a kind of legal "ménage à trois" in the mental health field, in which three (3) votes--the parents', the child's, and the state's--may be cast in respect to any decision involving the child. By holding that those same interests are also in conflict to an equal degree, the court is able to leap to the conclusion that the votes of the parents and of the child will

inevitably oppose each other, creating an impasse which neither the parents nor the child can resolve. With that sophistry as a premise, the court easily generates the conclusion that it is always the State's right and power, and must even be its duty--to be carried out by State psychiatrists--to cast the deciding vote within the group. Of course, since it is postulated that the interests of the parents and the child are in conflict, it would be unfair and violative of the child's constitutional rights of privacy if the State were to invade that privacy for the benefit of the parents! Therefore, since the State has the deciding vote, it is the State that has the need for medical information about the child, rather than the parents, whose vote is not and cannot be effective. State psychiatrists in the present case were thus fully justified in withholding information from the parents; the child's privacy rights, which the State has a "duty" to protect, would be lost if

respondents did not enforce them against the parents. By this reasoning, the trial court was able to ignore and refuse to answer the question of whether the State's parens patriae power can be exercised without due process of law. Since the respondents were only exercising their "fundamental" rights to cast a deciding vote within a legal "ménage à trois," the court was bound to abstain from interference in such "family" matters. All that was involved was a trade-off and balancing of opinions and judgments between family members, in which the opinions and decisions of State psychiatrists were entitled to prevail. Under 42 U.S.C. sec. 1983, the court had no doubt that the State psychiatrists are immune from liability connected with imposing their own judgments on patients and their families. That's what the parens patriae power is all about! The courts have no business in overseeing such matters, or in second guessing the actions of psychiatrists! The trial court did not explain how psychiatrists

are justified in overruling the concurring wishes of parents and child. It simply tacitly hypothesized that such an agreement could never happen, the facts of the present case notwithstanding.

From such reasoning, it is only one small step to the practices in the U.S.S.R. of declaring social and political dissidence to be a form of mental illness which justifies the State's confinement of the dissident for "treatment" in a state mental hospital for an indefinite period, without contact with family or friends.

In the present case, the respondents went far beyond even what the State by statute had declared to be its policy in such matters. In 1974, Mass. G.L. c.123, sec. 36, was amended to create an absolute right of a duly authorized attorney of a patient to inspect the patient's medical records. Respondents' own Departmental Legal Counsel in writing gave them a legal opinion that the statute gave John Doe the right to

inspect his daughter's medical records, because his daughter had given her consent on a form duly approved by the Department. Respondents simply rejected their own official legal counsel's opinion and advice about the law, but never obtained any other professional legal opinion to support their action. The opinion and advice given to them was later confirmed by the Massachusetts Supreme Judicial Court.

In Gomez v. Toledo, supra, 100 S.Ct. at 1924, this Honorable Court in essence recognized that a state official may have a defense to a civil rights action, based upon a subjective belief derived from advice of counsel. By implication, such a belief might entitle the official to immunity. In the within case, we have just the opposite; a subjective awareness on the part of the respondents that they were acting contrary to advice of counsel. In the judgment of the trial court below, however, it didn't matter whether respondents followed or

rejected their own counsel's advice, they were entitled to immunity:

> "The most that could be said is that defendants erred in not following their counsel's advice that the plaintiff as an attorney could obtain records despite his parental status. In view of the strict wording of the statute, however, we believe this decision fell within the administrative discretion which the immunity doctrine is designed to protect." (Appendix A-7)

Such an indulgent view defies understanding. The respondents were medical and psychiatric officials, not lawyers. They had no authority, duty, or professional competence to interpret laws or regulations concerning the scope of their official powers. The discretion that they exercised was not the discretion of a physician or psychiatrist as to the kind or extent of a patient's treatment. They exercised a self-declared discretion to expand their own powers beyond that given to them by statute, and did so in the face of legal advice to the contrary.

If the respondents believed in good faith

that their own counsel was wrong about the law, they could have gone to the Attorney General of Massachusetts or to the courts for a different opinion, but they did not. They simply enforced their own arbitrary view of the law. If immunity can attach to such conduct, then for mental patients the Bill of Rights is only the current dogma of the state of the art of psychotherapy; Big Brother is a psychiatrist and he is with us now. Hopefully this Court will rule otherwise.

Argument - The Applicable Limitations Period

In order to select the applicable limitation period to apply to the parents' civil rights action, it is necessary to analyze the facts in order to decide which is the most nearly analogous State limitations law. Here, the parent entered into a voluntary contract with the State for care and treatment to be given to his child. The State in writing advised John Doe that he would be held liable in contract for the value of the

treatment provided to his daughter, pursuant to Mass. G.L. c.123, sec.32. The Massachusetts statute of limitations that specifically applies to Mass. G.L. c.123, sec.32, is Mass. G.L. c.260, sec. 1, Fifth, which sets a twenty (20) year limitation period on such claims. Therefore, it is reasonable to include a twenty (20) year limitation period among the potentially most nearly analogous limitations periods that may apply. Of course, that period obviously has not expired in respect to the parents' claims herein.

In the present type of civil rights action, a contract analogy is far more appropriate than a tort or a medical malpractice analogy. The relationship of the parents and the respondent psychiatrists was derived from contract. The services and care that were to be provided were not to be provided to the parents directly; they were for the benefit of the child. The terms of the relationship between the parents and the

respondents depended upon the representations made and the documents signed. Respondents never warned or represented in advance to the parents that no medical reports, advice or information would be given to them, and the parents had no way of knowing that such would be the case. The respondents were aware that the parents were making a voluntary contract and that the child would be returning to the parents' care after treatment was over. As psychiatrists, the respondents had to be aware that the parents could have difficulty in caring for the child after treatment ended if they were not fully informed of her needs. Furthermore, it may be seen that no negligence was apparently involved in this case. Respondents deliberately refused to supply information; it did not happen unintentionally. The resulting damage was in the form of a broken relationship between the parents and child, apparently because the parents were forced to make decisions and to provide care for the child without professional reports, advice or

information, and their decisions were not the best that might have been made. But, in such a context, the parents could not be described as having been negligent, especially where they continuously tried to get as much advice as was available. The damages that were suffered were more the result of the failure to carry out a duty arising under contract to supply reports and advice, than as a result of a breach of warranty to perform professional services. If the respondents had provided reports which were negligently drawn, the breach of warranty analogy might be appropriate. That was not the case here.

Argument - Start of the Limitation Period

The court of appeals below did not affirm the immunity doctrine defense applied by the trial court; it simply disregarded it and applied a three (3) year limitation period, derived from the State's tort or medical malpractice limitation periods, set out in Mass. G.L. c.260, secs. 2A and 4. The court

of appeals ignored the procedural fact that the trial court's action was based on a motion to dismiss, which required the court to construe the complaint most favorably to the parents. In construing the complaint it was thus necessary for the court to consider all facts that would have been grounds for starting the running of the applicable limitation period within three years before the filing of the complaint or which would have tolled the running of the statute. The court of appeals did none of these. Instead, it simply held that the limitations period began to run no later than 14 November 1974, the date of the Commissioner's final refusal to allow inspection of records, holding

> "At that time plaintiff knew of his rights, if any, and of their rejection. Because the action was not commenced until over four years later, it is time barred." (Appendix A-57)

In so holding, the court of appeals disregarded Massachusetts law that a negligence action may not be maintained unless one has

suffered injury or damage, and that a time-of-injury rule applies even in product liability cases. Cannon v. Sears, Roebuck, 374 N.E.2d 582(1978). At that time, the parents had not yet been injured. In fact, Jane had recently been adopted by her stepmother and was living with her parents, although her emotional illness seemed to be returning.

The parents filed a timely petition for rehearing, citing two newly decided (after briefing and oral argument were over and shortly before the opinion of the court of appeals issued) cases in Massachusetts, in which the medical malpractice limitation period was held to run only from the time that the plaintiff learns or reasonably could have learned that he has been harmed by defendant's conduct. Franklin v. Albert, Mass. Adv. Sh. (1980) 2187; Teller v. Schepens, Mass. Adv. Sh. (1980) 2199. In those cases, the Massachusetts Supreme Judicial Court also held that in the

absence of explicit legislative direction, the determination of when a cause of action accrues, causing the limitation period to run, is a product of judicial interpretation; and that the court may depart from a particular rule if it is persuaded to do so.

Petitioners respectfully point out to this Honorable Court the fact that, in 1974 when respondents refused to permit statutory inspection of Jane's records, respondents had already continuously refused to allow the parents to have medical reports or advice as a matter of parental constitutional right. However, in determining when the applicable limitation period began to run, it should be noted that at all of those times and up until Jane reached her majority in April 1977, the likely victim and object of foreseeable injury from respondents' refusal was not the parents; it was Jane, the minor former patient. There was no reason for the parents to focus upon themselves as injured persons at that time.

The natural effect of the parents acting without professional guidance was that the child might be adversely affected, and that is the interpretation of the complaint that the courts below should have applied when acting on the motion to dismiss. Therefore, if a limitation period began to run, it was only on Jane's cause of action.

Even using the most restrictive analogy to apply a limitation period to the parents' civil rights action, and using a three (3) year period, that period could only have started to run after the Massachusetts Supreme Judicial Court in the middle of 1977 (after Jane had reached her majority) ruled that the parents would not be allowed to inspect Jane's medical records without a new consent from her. That point in time occurred less than three (3) years before the filing of the complaint herein, so the applicable limitation period has not run.

Until the Supreme Judicial Court ruled, the

parents believed that if they could obtain a medical report, advice and related information, and while Jane was still a minor, they could act with parental powers to obtain appropriate treatment for Jane and could personally act toward her in a way that would help to resolve her emotional problems and restore a sound parent-child relationship. They saw Jane as being emotionally ill; they did not see themselves as deprived of parental responsibility or of a parental relationship with her. But, when the Supreme Judicial Court made its ruling, that ruling hardened a situation in which Jane's emotional condition made it impossible for her to agree to permit her parents to see her records, and her majority made it impossible for the parents to act to provide treatment for her against her will as permitted by Parham v. J.R., supra. At that point in time, under State law the parents had lost their power to help Jane and the result was that the

breach of relationship first became apparent and permanent. It might not have had to be permanent if the respondents had then recognized that they had been wrong about refusing to allow John Doe to inspect Jane's records pursuant to statute, and if respondents had then exercised a statutory discretion which they continued to have under Mass. G.L. c.123, sec.36, and had allowed him to inspect Jane's records in 1977; but they persisted in their refusal. At that point, the parents first realized that they themselves had been injured, because the relationship that they had previously had, with parental constitutional power to preserve and protect, was then lost. As that point in time, the limitation period on the parents' action may be said to have started to run. The parents were entitled at the least to that favorable construction of the complaint when the trial court and court of appeals dealt with the question of when the limitation period began to run.

Petitioners respectfully contend that on the merits there can be no doubt that, if the special factors that must be considered in respect to parental rights are taken into account, even the applicable limitation period applied by the lower courts did not expire. A fortiori, in respect to a ruling on a motion to dismiss, it could not be held to have run.

Argument-Procedural Anticipation of Defenses

In drafting their complaint, the parents set forth all of the agreed facts from the earlier litigation before the Supreme Judicial Court and other facts which arose later in time. In ruling on respondents' motion to dismiss, the trial court was obligated to construe all of those allegations most favorably to the parents. The primary basis for dismissal was the trial court's finding of official immunity, but it also mentioned "in passing" that the applicable statute of limitations had expired. But the court made no finding at all in that regard except

for the running of a particular time period after the refusal to provide a medical report in 1974. The trial court failed to construe the allegations of the complaint most favorably to the parents in order to give them the benefit of any analogies of state law that might make a twenty (20) year limitation period as set forth in Mass G.L. c.260, sec. 1, Fifth, applicable. It failed to consider the allegations of the complaint most favorably to the parents in order to find fraudulent concealment of the parents' cause of action for their own injury, which would have tolled the applicable limitation period because of Mass. G.L. c.260, sec.12. It also failed to construe the complaint most favorably to the parents in order to find that their own injury first occurred within the applicable limitation period. The dismissal on the ground of a statute of limitations defense would have been clearly erroneous if the trial court had relied on it.

The parents' appeal focussed on the issue created by the trial court, relying on Gomez v. Toledo, supra, as authority for the proposition that they had pleaded a prima facie case that was not on its face dismissable. The court of appeals did not review the dismissal as if it was predicated on a finding of official immunity. It did not even touch that point. Instead, it ruled that the statute of limitations defense was a bar to the cause of action.

In so doing, the court of appeals did not even make cursory mention of the parents' procedural right to have the complaint construed most favorably to them if the motion to dismiss on the merits was to be granted. The court of appeals drew abstract analogies to Massachusetts tort and medical malpractice law without construing the complaint allegations in any way at all to be favorable to the parents.

It thus is clear that the court of appeals

has placed an immense burden on parents in civil rights cases under 42 U.S.C. sec.1983. Not only must they plead a prima facie cause of action as defined by this Honorable Court in Gomez v. Toledo, supra, but they must also allege facts that will anticipate every possible abstractly analogous limitation period that a trial or appellate court may apply to their cause, and must by such allegations avoid every expired limitation period or be subject to dismissal, even though the facts in their case are uncertain or are subject to more than one reasonable interpretation.

The court of appeals seems to have ruled that a parent in a civil rights action under 42 U.S.C. sec. 1983, gets only one bite of the apple, and that comes when he drafts his complaint. He must anticipate every defense that the opposite party may raise. He must assume that the court will dispose of the defense through a ruling on a motion to dismiss on the merits. He must assume

that the most limited limitation period will be applied by the court, and that the court will measure its running from the earliest possible date. He must assume that the trial court will not construe any allegations of his complaint favorably to him. He must assume that he will not be allowed to amend his complaint or to take discovery for the purpose of producing facts which will toll the limitation period. If he can draft a complaint that can stand up under such conditions, he may assume he has pleaded a prima facie cause of action. It is respectfully submitted that this Honorable Court does not appear to have said that in Gomez v. Toledo, supra. Unless the holding of the court of appeals is reversed, that will be the law in the first circuit.

Argument - Procedural Right To Amend

Aside from the above-argued issues about which limitation period is applicable and when it should be deemed to begin to run, the parents at the time they learned that the court of appeals would not follow this Court's decision in Gomez v. Toledo, supra, contended in their petition for rehearing that if respondents were to be allowed to rely on a statute of limitations defense in a motion to dismiss, it was incumbent upon the respondents to have affirmatively pleaded facts to support that defense--including allegations that each respondent had been a resident of Massachusetts during the entire limitation period relied on, since Mass. G.L. c.260, sec.9, tolls all limitation periods while a defendant is a nonresident. In fact, respondents had filed no such affidavits or allegations with their motion to dismiss; they simply relied on the bare allegation that more than three (3) years had passed since the time when they claim the period commenced to run.

The record in the case, but not the appendix then before the court of appeals, showed that two of the respondents, Goldman and Ewalt, had been served with legal process in the case outside of Massachusetts. The parents claimed that they were entitled to take discovery and to show that those respondents were not entitled to the benefit of the statute of limitations applied by the court. The court of appeals denied rehearing on this point, holding

> "Defendants showed a prima facie case with respect to the statute of limitations. The burden shifted to plaintiffs to show it was tolled. (citations omitted) This they did not do. Evidence that two defendants were served outside the state does not establish that they were outside during the initial three years. Nor does Jane Doe's minority suffice; it is not her cause of action that is being pursued. It is too late for plaintiffs to raise a new point, let alone amend the record." (Appendix A-80)

Of course, the parents were not seeking to amend the record. The fact of out of state service of process on two respondents was in the record. The parents were saying that the court of appeals had created an issue on appeal that they had never had a chance

to meet in the trial court, and they wanted an opportunity to plead, to take discovery, and to offer proof, so that the merits of that issue could be made a matter of record for any subsequent review. Clearly, the parents could not be charged with the burden of pleading the facts of out-of-state residencies about which they had no knowledge. At the same time, if some or all of the respondents had been out of the state during the allegedly applicable limitations period, the parents were entitled to the benefit of the tolling statute, Mass. G.L. c.260, Sec.9. The only issue was a procedural one, namely, whether the parents were too late in seeking to oppose the statute of limitations defense by offering proof of tolling, where they had had no procedural opportunity to offer that proof before. The record itself contained the Marshals' returns of service, showing out of state service of process on Goldman and Ewalt. That was enough to establish that the parents' claim of tolling was not either

frivolously raised or immaterial to the defense relied on. Fairness demanded that the parents have an opportunity to present their side of that issue, in accordance with principles of modern pleading. As this Court said in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 335 (1971), 91 S.Ct. 795, 804,

> "The interests of justice thus clearly require that if HRI's limitations defense is to be considered on its merits, Zenith's claim of tolling must be dealt with as well."

Petitioners therefore respectfully submit that they were improperly and unjustly denied an opportunity to have their tolling claims considered, as the interests of justice in the case required, and that the judgment of the court of appeals below should be reversed if the procedural principles declared by this Honorable Court are to be maintained in the first circuit.

Argument - Summation

The jurisdiction of this Honorable Court is being invoked by petition for certiorari. It is respectfully contended that the conditions set forth in Supreme Court Rule 17.1 have been met in this case and qualify it for consideration for review.

1. The trial court decided the motion to dismiss in a manner which is in direct conflict with this Court's decision in Gomez v. Toledo, supra.

2. The court of appeals decided the appeal by upholding the limitation defense, in a manner which appears to conflict directly with this Court's decision in Gomez v. Toledo, supra.

3. The trial court and court of appeals decided the issue of when the applicable limitation period runs, in a manner which is in direct conflict with Massachusetts law declared by the highest court of the state, where that law was the analogy used to determine the running of the period.

4. The manner in which the trial court and court of appeals disposed of the petitioners' cause of action below seriously affects the ability of all parents similarly situated to make out a cause of action under 42 U.S.C. sec. 1983 where their constitutional rights and duties as parents are involved. Important questions of federal law concerning the affirmative assertive constitutional rights of parents which have not been, but should be, settled by this Honorable Court, are involved in the case.

5. The procedural issues were disposed of below in a way that calls for the exercise of this Court's power of supervision, especially where this Court's decision in Gomez v. Toledo, supra, reversed the court of appeals for the first circuit, and that court apparently has disregarded this Court's holdings on the subject.

Finally, there is a need to define for parents and for children, as well as for governmental authorities, the scope of

parental powers to be affirmative and to be assertive in respect to a child in a manner to which the child, government, and society must defer. The constitutional rights and powers of parents are necessarily derived from the responsibilities historically and traditionally imposed on and assumed by parents. The concept of legal minority acts to delimit the scope of parental responsibility and therefore delimits the scope of parental powers. In recent years, however, there have been court decisions which appear to have eroded parental powers without diminishing parental responsibilities, and these decisions have caused serious problems. The concept that a minor has a constitutional right of privacy, with a corresponding right to make informed decisions and to give informed consent in ways that conflict with parental values and judgments has resulted in the part emancipation of the child without any corresponding emancipation of the parent. Using this concept as a wedge, government has further eroded parental powers by

statutorily imputing to minors the ability to make informed judgments and to give informed consent in a variety of personal choices, to the exclusion of parental knowledge, supervision or controls. At the same time, despite the conflict that this introduces into the parent-child relationship, the parents are still subject to the duty to provide care and protection for the child within the family structure. If the parents are unable even to determine when or where their own authority or power begins or ends, their control over their ability to provide care and protection for the child becomes further diminished. If the child runs away, the law treats the parents as having failed in their responsibilities. If the child causes damage, the law may hold the parents responsible to the injured parties. But, if the parents demand the support of society and government, they are told that the child's rights may not be infringed. This confusion is a major concern which this Court should address.

In the present case, the State in writing informed the parents that, pursuant to Mass. G.L. c.123, sec.32, they would be held liable for the cost of Jane's State hospital care. This, in effect, was a statutory declaration that Jane was not emancipated insofar as her treatment was concerned. The contract for treatment was not being made with her alone, based upon her ability to give informed consent. Yet, later, the respondents insisted that Jane had rights of privacy that the State, through their professional actions, had the right and power to protect. Clearly, the parents were not emancipated from their responsibilities, but the State apparently was declaring that Jane was emancipated from her parents. This is the kind of paradox which had resulted from the fragmentation of the concept of minority. This case is an appropriate one by which the subject can be and should be considered and resolved. The problem is general and widespread. Petitioners respectfully pray that certiorari be granted.

Respectfully submitted

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80-1398

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN DOE and MARY DOE, Plaintiffs	]	
vs.	]	Civil Action No.
WILLIAM GOLDMAN, HALIM MITRY, THEODORE I. ANDERSON, WILFRED BLOOMBERG, JACK R. EWALT, AXEL HOFFER, and JOHN NELSON Defendants	]	79-0313-M

MEMORANDUM AND ORDER
May 20, 1980

This is a civil rights action under 42 U.S.C. §1983 for damages stemming from the alleged deprivation of the plaintiffs' constitutional rights as parents. The claim is based on the wrongful withholding of medical records and information concerning the treatment of their daughter during voluntary commitment at the Massachusetts Mental Health Center from 1972 to 1973. In a prior action in state court, the plaintiff, John Doe, sued the Commissioner of Mental Health and another defendant named

here [1] for failure to produce his daughter's records pursuant to Mass. Gen. Laws c. 123 §36, which provides for access by attorneys who have obtained patient consent. [2] In that case, the defendants refused to furnish records or any other written reports to the plaintiff, even though he was representing his daughter in a trust management suit and had obtained

1. The second named defendant in the state court action was Dr. Halim Mitry, Chief Executive of the Massachusetts Mental Health Center. The new defendants here are Theodore I. Anderson, Acting Deputy Commissioner of the department at the time of the first suit; Wilfred Bloomberg, the Deputy Commissioner, Jack R. Ewalt, the Superintendent of the Center; John Nelson, Jane's treating physician and psychologist; and Alex Hoffer, Assistant Clinical Director of the Center.

2. The pertinent part of the statute provides: "(the) records shall be private and not open to public inspection except (1) upon proper judicial order whether or not in connection with pending judicial proceedings, (2) that the commissioner shall allow the attorney of a patient or resident to inspect records of said patient or resident if requested to do so by the patient, resident or attorney and (3) that the commissioner may permit inspection or disclosure when in the best interests of the patient or resident..." Mass. Gen. Laws c. 123 §36.

permission from the daughter on forms supplied by the department. The reason for refusing access after consent had been obtained was that the plaintiff's parental interest overrode his interest as an attorney and that it was therefore necessary "to protect the welfare of the patients and the relationship between patients and families." The Supreme Judicial Court held that since the plaintiff was legitimately acting as the child's attorney, the Commissioner had no discretion under the law to withhold records after lawful consent had been obtained. No damages were found, however, and because there was a legitimate issue over the ability of a minor to consent, the Court conditioned the father's access to the procurement of a new consent by his daughter, who had since reached the age of majority and no longer has contact with her parents. Constitutional issues were expressly reserved. Doe v. Commissioner of Mental Health, 372 Mass. 534 (1977).

In this case, the plaintiffs claim that the failure to receive the records when requested, coupled with the defendants' refusal to provide any substantive reports about their daughter's treatment, prevent essential decision-making about the health and welfare of the child after her release, and, as a consequence, led to the breakdown of their relationship. The claim of entitlement is grounded primarily upon the concept of parental rights.[3/]

The case is now before the Court on the defendants' motion to dismiss. In this context, all averments are taken as

3. The concept of parental rights is generally recognized to be protected within the ambit of liberty preserved by the Due Process clause of the Fourteenth Amendment. Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390 (1923). Since Mary Doe is a step-parent, however, there is a substantial question as to whether she can assert those rights fully. For purposes of this action, we will assume that she can, in view of the Supreme Court's recognition of the rights of family units "already in existence." Quilloin v. Walcott, 434 U.S. 246, 255 (1978). Moreover, there is no other person to assert those rights, since Jane's natural mother is deceased.

admitted, and we must construe the complaint in the light most favorable to the plaintiff. Jenkins v. McKeithen, 395 U.S. 411, 421-422 (1969); Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Though overly long and repetitious [4/] the complaint does raise important questions about the scope of parental rights and the power of the state to intervene in the mental health area.

4. We note that the complaint is substantively deficient under Fed.R.Civ.P. 8(a)(2), which requires a "short and plain statement of the claim." Running over 63 pages in length, with attachments, the complaint is vague and redundant, thus failing its duty to provide fair notice and sharpen the issues. Brown v. Califano, 75 F.R.D. 497 (D.D.C. 1977). More importantly, defendants Anderson, Bloomberg, Ewalt, Hoffer, and Nelson are only named in the caption of the complaint but nowhere appear in the pleadings. While plaintiffs argue that the facts as alleged should be binding on these new defendants, allegations and proof of personal involvement are a prerequisite to recovery in §1983 actions. McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir.1977), cert. denied, 434 U.S. 1087 (1978); Kostka v. Hogg, 560 F2d 37, 40 (1st Cir. 1977). Thus, if it were not for the disposition of this case, the complaint would at least warrant dismissal under Rule 8(a)(2) against these five defendants. Kadar Corp.v. Milbury, 549 F.2d 230, 232 (1st Cir. 1977). We prefer to deal with the substance of the claims.

The Standard for Liability under 42 U.S.C. §1983

As officials in a state hospital, the defendants are entitled to a qualified immunity against suits for damages. O'Connor v. Donaldson, 422 U.S. 563 (1974). Whether immunity extends in this action depends on if defendants knew or reasonably should have known that the actions taken within the sphere of official responsibility would violate the Constitutional rights of the plaintiff or if there was malicious intention to cause a deprivation of Constitutional rights or other injury. Harper v. Cserr, 544 F.2d 1121 (1st Cir. 1976); Wood v. Strickland, 420 U.S. 308, 322 (1975). The policy is to encourage good faith fulfillment of official responsibilities and to insure that discretion will be exercised without undue timidity. Wood v. Strickland, supra, at 321; see also Cruz v. Betco, 630 F.2d 1178, 1183 (5th Cir. 1979). Taking the second part of the test first, immunity will be forfeited if there is a subjective intent to injure

regardless of the nature of the rights recognized at the time. McNamara v. Moody, 606 F.2d 621, 625 n. 7 (5th Cir. 1979). Beyond the bare allegations in the pleadings, however, there is nothing in the complaint which, if proven, could establish intent in the tortious sense required under this standard. Procunier v. Navarette, 434 U.S. 555, 566 (1978); Restatement (Second) of Torts, §8A. The most that could be said is that defendants erred in not following their counsel's advice that the plaintiff as an attorney could obtain records despite his parental status. In view of the strict wording of the statute, however, we believe this decision fell within administrative discretion which the immunity doctrine is designed to protect.

Recovery under Section 1983 is therefore possible only under the first part of the test, which subjects an official to liability if at the time of his conduct, the actions violated settled, indisputable law

even if he acted in good faith. Procunier v. Navarette, supra. "The fulcrum...is the existence of clearly established judicial decisions that make (the) action unconstitutional." Bogard v. Cook, 586 F.2d 399, 411 (5th Cir. 1978), cert. denied 100 S.Ct. 173 (1980); accord McNamara v.Moody, supra. The hospital administrators, as a result, cannot be charged with foreseeing later developments in constitutional theories affecting their responsibilities Procunier v. Navarette, supra; Hoitt v. Vitek, 497 F.2d 598 (1st Cir. 1974).

The claim to mental health records and reports is based on a very generalized concept. While parental rights have been fostered in many areas of child care, however, in the field of mental health the proper allocation of responsibility between parent, child, and state has been examined only recently, and with ambiguous results. See Note, The Mental Hospitalization of Children and the Limits of Parental

Authority, 88 Yale L.J. 186 (1978). An inspection of the current state of the law is helpful in determining the strength of the complaint.

The Scope of Parental Rights.

It has long been recognized that parental authority over minor children is a right encompassed within the ambit of liberty protected by the Due Process Clause of the 14th Amendment. Meyer v. Nebraska, 262 U.S. 390 (1923). As the Supreme Court states in Stanley v. Illinois, 405 U.S. 645 (1972), "the private interest...of a man in the children he has sired and raised undeniably warrants deference. and, absent a powerful countervailing interest...protection."

It is not enough to say that the right exists to prove its applicability in all circumstances, however, for like all constitutional rights, parental authority is not beyond regulation. Prince v.

Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1924). Although it is protected against unreasonable interference, countervailing interests both of the state and child may compel intrusions on the parental role. See Note. Developments in the Law - The Constitution and The Family, 93 Harv. L. Rev. 1156, 1350 (1980). Thus, under its parens patriae power, the state may assume authority where the health or welfare of the child is at stake. See Prince v. Massachusetts, supra (child labor laws); Jacobsen v. Massachusetts, 197 U.S. 11 (1905) (vaccination); compare Wisconsin v. Yoder, 406 U.S. 205 (1972). Similarly, controls imposed on the child for societal or parental benefit may be prohibited if they abridge the child's fundamental rights. In recent years, for example, the protections of the Bill of Rights, particularly the right of privacy have been invoked to strike down unjustified restrictions on a minor's right to an

abortion or to access to contraceptives. Bellotti v. Baird,U.S. 99 S.Ct. 3035 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Carey v. Population Services, 431 U.S. 678, 692-693 (1977) (plurality).

The interests of the state, child, and the parent intertwine and conflict to an equal degree in the mental health field. To the child, even in the voluntary commitment setting, confinement and treatment represent a substantial infringement on interests in liberty and reputation. See Ingraham v. Wright, 431 U.S. 651, 673-674 (1977); Paul v. Davis, 424 U.S. 645, 708-709 (1976). In the context of this case, the privacy interest is equally as strong as the desire for proper care and confinement. Carey v. Population Services, supra. The parent, conversely, would like to assert a paramount interest in the "care and nurture" of the child. Bellotti v. Baird, supra; Prince v. Massachusetts, supra. For its part, the state has a legitimate interest

under its parens patriae power to provide care for the emotionally disturbed, see Addington v. Texas, 441 U.S. 218, 99 S.Ct. 1904 (1979), and to protect its patients' privacy. In voluntary commitment cases, the state's interest may be subrogated to some degree to the child's, but the duty to protect becomes preeminent when the child's welfare is threatened.

No subject in this field can be more fraught with conflicting rights and obligations than the control and dissemination of information about patients. The unrestricted right which plaintiffs demand strikes at the very balance of responsibilities on which our present mental health care system rests. During the time of the incidents presented here, we can find no suggestion that a right to such information existed or was ever recognized. While recent Supreme Court cases do indicate that in the future parental authority may require more adequate recognition in the areas of mental

health care, no clearly established theory has been expounded which, by implication, proves the existence of a heretofore unsuspected "right" to information. See Bellotti v. Baird, supra; Parham v. J.R., 442 U.S. 584 (1979).

The Parham case is most pertinent, since it examines the parents role in mental health treatment. The issue was whether voluntary commitment constituted an invasion of the child's liberty interest so as to require an adversary hearing prior to commitment. In rejecting this notion, the Court carefully balanced parental rights against the independent state interest in an efficient system fostering the legitimate needs of its patients. To the parents the Court explicitly delegated the primary responsibility for mental health treatment of minors, concluding that the right to seek and follow medical advice for their children requires that they retain "a substantial, if not the dominant role..." in the

voluntary commitment setting. Id at 602. However, the power of commitment is not "absolute and unreviewable," and the decision to commit was thus made contingent on a neutral screening process in which the independent judgment of the physician assumes a pivotal role. Id. at 607-608.

The Bellotti case reached a similar result in an equally critical area of health care, holding that while a state could legitimately choose to foster parental involvement in a medical decision, under Planned Parenthood v. Danforth, supra, a minor's right to an abortion could not be predicated on parental consent.

As the most recent expositions on parental rights, Parham and Bellotti provide no basis for determining that the mechanism regulating access to confidential information in mental hospitals should be disturbed on constitutional grounds. Parental consent and involvement in decisions by

minors is important to their well being and may ultimately be preferred. This is indeed commensurate with common law understanding that parental consent to medical treatment, absent emergency or threat of harm is usually required. See Baird v. Attorney General, Mass., 300 N.E. 2d 288, 295 (1977). At the same time, the cases make clear, where a critical interest of the child arises, the parental role must be tailored appropriately, either to preserve exercise of a fundamental right or to insure that the best interests of the child are adequately protected. In this context, several lower courts have recently struck down statutory provisions requiring even notice to parents before their children undergo abortions, construing the requirement as unduly burdening the minor's fundamental right. Akron Center for Reproductive Health v. City of Akron, 479 F. Supp. 1172, 1202 (N.D. Oh. 1979); Women's Community Health Center, Inc. v. Cohen,

477 F. Supp. 542, 547-8 (D.Me. 1979).[5/] We do not suggest that a demand for psychiatric reports rises to this level of infringement, but the little decisional law existing on access to actual mental health records, the nub of the dispute here, does indicate that privacy interests and the need to insure a stable atmosphere for treatment support restrictions on information, even to the patients themselves.

Access to Mental Health Records

The issue of access to mental health files has most often arisen in the context of a patient's or former patient's claim for copies under state law. See Gotkin v. Miller, 379 F. Supp. 859 (S.D.N.Y. 1974), aff'd 514 F.2d 125 (2d Cir. 1975); Shikara v. Commissioner of Mental Health, 352 Mass. 779 (1967); Bane v. Commissioner of Mental

5. Compare H.L. v. Matheson, 604 P.2d 907, 911-912 (Ut. 1979), prob. juris noted, 48 U.S.L.W. 3554 (Feb. 26, 1980) (No. 79-503), where the Utah Supreme Court upheld a parental notice statute as a permissable, although not constitutionally required, means to foster parental involvement.

Health, 350 Mass. 637 (1966). On the statutory level, these claims have failed because, as in the majority of states, former patient access to medical records without resort to litigation is the exception rather than the rule. Gotkin v. Miller, supra, 379 F. Supp. at 867. In Massachusetts mental health records are specifically exempted from the direct access law for general hospital records. Mass. Gen. Laws c. 111 §70.

The rationale for these laws is compelling and can be applied to a generalized claim for detailed written reports, as asserted here. Information can be misconstrued and thus affect the recovery and well-being of the patient. The records often contain information and personal observations from third parties, such as relatives, which are entirely confidential. See Gotkin v. Miller, supra, 379 F. Supp. at 866, citing Department of Health, Education and Welfare, Report of the Secretary's Commission

on Medical Malpractice (1973). In addition, the records can properly be considered the property of the physician and the hospital, and not of the patient.

In constitutional terms, this lack of entitlement under state law deprives plaintiffs of any possible claim to a property interest under the Due Process Clause, since the establishment of such an interest is the result of state and not of constitutional law. Board of Regents v. Roth 408 U.S. 564, 577 (1972). While the Supreme Judicial Court held that the plaintiff may be entitled to records as an attorney, such a decision does not mandate finding an unrestricted direct claim to the records, as is sought in this action. Moreover, entitlement as a parent, accompanied by consent of the child, was an issue expressly reserved by the Court. Doe v. Commissioner of Mental Health, supra at 538 n 5.

Other constitutional grounds for access

have been reviewed elsewhere and rejected. There can be no claim to deprivation of liberty because neither the plaintiff not their daughter have, to any degree, been "stigmatized" by the nondisclosure. Gotkin v. Miller, supra, 514 F2d at 130; of Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Though not advanced here, claims under the First and Fourth Amendments also merit little attention. Gotkin v. Miller, supra, 379 F. Supp. at 859. We are thus left with the concept of parental rights which, although substantial, does not warrant a wholesale invasion of the rights of both the minor child and her physicians. To so hold here would not only overcome the substantial policy reasons for maintaining confidentiality of these records, but would also contravene the intention of the Commonwealth. As the Supreme Judicial Court noted, Mass. Gen. Laws c. 123 §6 "was intended to protect patients from the potentially detrimental impact of disclosure of

records to third parties." Doe v. Commissioner of Mental Health, supra, at 537. No clear constitutional policy has yet been established which would diminish this interest in favor of parents.

There are other sound reasons for not placing a constitutional imprimatur on the demand for patient information where the rights of others are involved. For some time, for example, courts have recognized that unrestricted access to confidential family records in the adoption field would represent an undue infringement on parental privacy rights not warranted by the public interest or the interests of the child seeking the records. Thus, the limitation of access based on a valid state interest in protecting the rights of others is not an unconstitutional exercise. See Alma Society, Inc. v. Mellon, 459 F. Supp. 912 (S.D.N.Y. 1978), aff'd 601 F.2d 1225 (2d Cir. 1979), cert. denied, 100 S. Ct. 483 (1980). Here, the rights of patients',

physicians, and confidential third parties are guarded. The physicians's interest is particularly important, since, as the Supreme Court has noted, his independent judgment is critical to preserve the child's separable rights. Parham v. J.R., supra.

There is also a well-founded preference for federal courts to abstain for reasons of commity and common sense from adjudicating family or matrimonial matters that are better handled by state courts. Armstrong v. Armstrong, 508 F.2d 348 (1st Cir. 1974); Phillips, et al v. Rosentiel, 490 F.2d 509 (2d Cir. 1973). While this theory generally pertains to matrimonial and custody matters, the rationale that the state courts are better equipped to consider fully the interests of the family and child is compelling here, particularly since under the statute a parent may apply for an order compelling disclosure, after which a court, in light of all the circumstances, may adequately balance the needs of both

parties, keeping the well being of the child foremost in mind. Mass. Gen. Laws c. 123 §36(1).

Nor should the practical problems be overlooked. If a positive duty to disclose sensitive confidential information about illness and diagnoses is established, serious questions will be raised about the ability of physicians and psychiatrists to proceed with treatment in emergency situations or where the minor is mature, incidences where parental involvement has traditionally been obviated. See Prosser, Torts §33 at 168; also Baird v. Attorney General, supra at 295 (mature minor rule in Massachusetts). Conversely, in involuntary commitment proceedings, we have no doubt that an absolute right to disclosure inures to the patient and possibly her parents. See United States ex rel. Hill v. Johnston, 321 F.Supp 881 (S.D.N.Y. 1971) (right to records under 42 U.S.C. §1983 to challenge commitment based on findings

of mental incompetence).

Conclusion

For the foregoing reasons, the plaintiffs have failed to establish a settled, indisputable right to the information and records demanded in the complaint. In the particular area of access to psychiatric files, decisional and statutory law dictate that confidential records remain secret except to the extent permitted by law. Parental rights have not yet expanded to foreclose state assertion of the child's interest in privacy, which protects as well the interests of physicians and other third parties who have taken part in the treatment process. We note, too, in passing, that the complaint is untimely. In Section 1983 actions, we apply the statute of limitation governing the most analgous claim under state law, which has been generally held to be a tort. Pinero Schroeder v. Federal National Mortgage Assn., 574 F.2d 1117, 1118 (1st Cir.1978);

Kadar Corp. v. Millbury, 549 F. 2d 230 (1st Cir. 1977). Under Mass. Gen. Laws. c. 26 §2A, all tort actions must be commenced within three years after the cause of action accrues. [6/] Similarly, Mass. Gen. Laws c. 260 §4 provides a three year limit for actions against physicians, hospitals and sanitoria. Both limits are exceeded here. The complaint cannot be construed as a continuing tort, as plaintiffs urge, for several reasons. First, the applicable state law indicates a reluctance to extend the concept of what is "continuing" beyond instances of nuisance or trespass. See White's Farm Diary, Inc. v. DeLand Separation Co., 433 F.2d 63 (1st Cir. 1970) and

6. One exception is where there has been fraudulent concealment of the source of the cause of action. Plaintiffs' contention that such concealment took place here, however, is inadequate, since the charging party must be deprived of the knowledge of the existence of the cause of action Hernandez Jiminez v. Calero Toledo, 604 F.2d 99 (1st Cir. 1979); Briley v. California, 564 F.2d 849 (9th Cir. 1977). The defendants' refusal to provide the information demanded was evident and cannot be construed as concealment.

cases cited therein; more importantly, a Section 1983 claim for relief has generally been held to arise at the first interference with a victim's rights. Hill v. Trustees of Indiana University, 537 F.2d 248 (7th Cir. 1976); Rhinehart v. Locke, 454 F.2d 313, 315 (7th Cir. 1971); Peck vs. United States, 470 F. Supp. 1003 (S.D.N.Y. 1979). The final denial of access from the Commissioner occurred in 1974, five years prior to the filing of the complaint. Thus, even if a constitutional right or a malicious intent to injure could be asserted, the claim would nevertheless be barred.

In accordance with the above, the defendants' motion to dismiss is granted.

SO ORDERED.

/s/ A. David Mazzone
United States District
Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN DOE, et al,
Plaintiffs

v.

WILLIAM GOLDMAN, ET AL,
Defendants

CIVIL ACTION NO.

79-0313-MA

ORDER OF DISMISSAL

MAZZONE, D.J.

In accordance with the Court's memorandum and order entered this date, allowing the defendants' motion to dismiss, it is hereby ORDERED that the complaint be and hereby is dismissed.

By the Court,

May 20, 1980

Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN DOE and MARY DOE, Plaintiffs	]	
vs.	]	Civil Action No.
WILLIAM GOLDMAN, HALIM MITRY, THEODORE I. ANDERSON, WILFRED BLOOMBERG, JACK R. EWALT, AXEL HOFFER, and JOHN NELSON Defendants	]	79-0313-M

PLAINTIFFS' MOTION TO VACATE JUDGMENT
PURSUANT TO FRCivP RULE 59(e)

Now come the plaintiffs by their attorney, pursuant to FRCivP Rule 59(4), and respectfully move that:

A. The Court reconsider its Memorandum dated 20 May 1980, on the grounds below and in their Brief set forth:

B. The Court vacate its Order of Dismissal and Judgment dated 20 May 1980.

C. The Court therafter deny defendants' Motion to Dismiss.

D. The Court thereafter grant plaintiffs'

Motion for Summary Judgment.

E. The Court enter such other orders as in connection therewith may be appropriate.

In support of their motion, the plaintiffs rely on the following grounds, inter alia:

1. The Court failed to take all of the averments of the complaint as being admitted, and apparently disregarded many averments thereof,

a) Mary Doe is found to be only a step-parent with doubtful rights. Complaint paragraphs 5 and 62 clearly allege she became a parent by adoption in 1974. Her rights are that of any natural parent.

b) Defendant Anderson, Bloomberg, Ewalt, Hoffer and Nelson are found to be named only in the caption of the complaint but not elsewhere therein. However:

(i) Anderson is mentioned by name at complaint paragraphs 8 and 30, and in Exhibits E and F,

(ii) Bloomberg is mentioned by name at complaint paragraphs 9 and 48, and in Exhibit R; and he is an addressee of a copy of Exhibit E.

(iii) Ewalt is mentioned by name at complaint paragraph 10 and in Exhibit A; and he is an addressee of a copy of Exhibit E.

(iv) Hoffer is mentioned by name at complaint paragraphs 11 and 25, and in Exhibits B and C.

(v) Nelson is mentioned by name at complaint paragraph 12 as the attending physician who provided treatment, and in Exhibit B.

(vi) All of the defendants are referred to at complaint paragraph 13; and throughout the complaint the defendants are referred to in the plural, as a group.

2. The Court failed to construe the averments of the complaint most favorably to the plaintiffs:

a) The complaint relies on facts stipulated in previous litigation before the Supreme Judicial Court of Massachusetts between virtually the same parties in interest, in which declaratory judgment and mandamus was sought. Although defendants Anderson, Bloomberg, Ewalt, Hoffer, and Nelson were not named party defendants in that litigation, their conduct and intentions were equally involved in that case as in this one. In that case, however, they were not necessary parties, since mandamus would have been effective against all if it had been ordered against defendant Goldman. Construing the complaint most favorably to plaintiffs, all of the stipulated facts should have been taken as proved herein.

b) Taking into account the fact that defendants in the prior litigation had the very same attorney therein as they have now, defendants cannot be deemed to be confused or adversely affected by

a complaint which recites verbatim the facts which that lawyer stipulated to for purposes of the prior litigation. In fact, the only way properly to allege those stipulated facts which are herein relied on as confessed and res judicata would be to state them verbatim either in the body of the complaint or as an appendix thereto. Plaintiff elected to place them in the body of the complaint, properly captioning them as such--as shown at complaint page 6.

c) The Court arbitrarily and contrary to the averments of the complaint assumed that the defendants had properly invoked and exercised the State's parens patriae power in this case. There is nothing in the complaint that shows that the elements necessary to invoke the parens patriae power were present in the instant case.

(i) Plaintiffs' daughter was not

under defendants' care or control. They had long before released and discharged her from their own care into the care and custody of the plaintiffs.

(ii) Plaintiffs at all times were legally competent, personally and as parents; and at all times during their daughter's voluntary hospitalization, plaintiffs were her legal guardians and responsible for her care and treatment.

(iii) In respect to the request to inspect the medical records of the minor former patient pursuant to statute, the plaintiffs and their daughter were all agreed that inspection should be permitted.

(iv) Defendants admittedly (complaint paragraph 26) had made no professional judgments about plaintiff John Doe which would warrant the application of the parens patriae power. They

made no evaluation of plaintiff Mary Doe either.

(v) Defendants made no finding that the plaintiffs' minor daughter would be in any way threatened or adversely affected if her medical records were inspected by plaintiffs (Complaint paragraph 25).

d) The Court arbitrarily and contrary to the averments of the complaint assumed that the defendants had properly exercised the State's parens patriae power in accordance with due process of law to abridge the plaintiffs' rights as parents in the present case. There is nothing in the complaint that shows that defendants utilized due process of law to deprive plaintiffs of their constitutional rights as parents by means of the State's parens patriae power. The Court arbitrarily assumed that the parens patriae power can be exercised

without due process of law to abridge constitutional rights.

(i) The plaintiffs and their daughter were at all times legally competent and of full capacity, except that the daughter was a minor and subject to plaintiffs' legal custody and care.

(ii) Defendants never invoked any legal proceedings to acquire jurisdiction over the person of plaintiffs' daughter or to seek judicial approval of any exercise of the State's parens patriae power against plaintiffs' parental interests while their daughter was under plaintiff's guardianship.

(iii) Defendants never held any hearings, never made any findings, never disclosed to plaintiffs or their daughter any alleged basis for the exercise of the State's parens patriae power, and provided no method

of appeal from their actions.

(iv) Defendants predicated their actions--which this Court holds was an exercise of the State's parens patriae power--solely upon a subjective policy judgment that as a class all parents should be denied the right to inspect their minor children's medical records in mental health cases. Defendants followed no objective standard in their actions. No finding was made that plaintiffs' daughter's welfare was threatened. No finding was made that the child's liberty interest or privacy interest was adversely affected. The child herself, at the age of 15, consented in writing to the inspection of her medical records. The age of 15 is an age at which courts have held that a child may exercise her own liberty and privacy interests. Defendants made no finding that plaintiffs' daughter was not

competent to exercise her rights, or that she exercised them involuntarily in any way.

(v) The defendants' actions were taken upon the premise that defendants had the personal power to abridge the constitutional rights of any parent without a hearing, without due process, and without affording a right of appeal or review, simply upon the basis of a general opinion about the relationship of the parents generally to mental patients and former mental patients.

(vi) Defendants' actions were taken contrary to the advice and opinion of their Departmental Legal Counsel who knew or should have known of the scope of the State's parens patriae power, who was privy to the opinions and findings of the defendants, and yet who advised defendants that under

the pertinent statute, plaintiff John Doe was entitled to inspect his daughter's medical records.

3. In ruling on the issue of access to medical records of mental health patients, whether minor or adult, this Court failed to take into account the settled, indisputable fact that at least since 1974 in Massachusetts there has been no public policy of law against all or any access to such records either by the patient or by the parents of a minor patient. Since at least 1974, the only legal requirement that may be imposed is that access to such records be through the services of an attorney at law. See Mass. G.L. c.123, sec. 36. There is nothing in Massachusetts law that imposes any restriction on the attorney in respect to divulging the information obtained from said records. That is a matter between him and his client alone. The arguments relied on by this Court as a basis for the application of the parens patriae

power are thus not applicable in Massachusetts, except where due process of law is utilized to prove that a clear and present threat to the patient's welfare exists and due process of law is followed to allow the constitutional rights involved to be abridged. At the time in 1974 that plaintiff applied to see his daughter's records --when she hadn't been under defendants' care for more that 18 months--defendants were told by their own Departmental Legal Counsel that the law of Massachusetts entitled plaintiff John Doe to inspect those records. The complaint and the record of the prior litigation is devoid of any allegations that defendants rejected their Departmental lawyer's opinion upon the basis of other specific facts pertaining to some direct threat to the former patient's health or welfare. It is clear that their Departmental Counsel acted with full information in the matter and informed defendants what the settled, indisputable law

of Massachusetts then was--and they rejected that opinion. Plaintiffs were entitled to such a favorable construction.

4. In ruling on the standard for liability under Section 1983, this Court inter alia held that defendants are entitled to qualified immunity, depending upon whether they knew or reasonable should have known that actions taken within the sphere of official responsibility would violate the constitutional rights of persons.

a) In so ruling, this Court made a number of unwarranted assumptions unfavorable to plaintiffs, which were without foundation in fact or law.

(i) The Court assumed that defendants were acting within the sphere of official responsibilities and discretion when they disregarded the opinion of their Departmental Legal Counsel about the plaintiffs' right to inspect their daughter's records.

There is no averment about the scope of defendants' official responsibilities except as professional psychotherapists and hospital administrators. The Supreme Judicial Court ruled that the pertinent statute gave no discretion to defendants about disclosing medical records to attorneys. (See complaint paragraph 83). It is thus clear that defendants at the time had no official responsibilities to exercise in the matter and no discretion which was protectable. The issue is not and cannot be whether defendants in good faith exercised discretion to decide that they had such responsibilities. In a government of enumerated powers, officials cannot expand or enhance their responsibilities simply by an exercise of good faith. They never had the responsibility and thus have no qualified immunity for their actions.

(ii) The Court assumed that defendants were acting within the sphere of official responsibilities when they rejected their Departmental Legal Counsel's opinion to the effect that they had no discretion and were obligated to allow plaintiff John Doe to inspect his child's records. But there is nothing in the averments which remotely suggests that it was within defendants' responsibilities or qualifications to interpret the laws of Massachusetts at all, or to interpret and apply them contrary to the Department's own Legal Counsel's advice. Construing the complaint most favorably to plaintiffs, the Court ought to have found that the only one who had official responsibilities and discretion to interpret the laws of Massachusetts under the facts of this case was the Department's Legal Counsel, and it was he that was entitled

to qualified immunity for exercising his discretion in interpreting the law--not defendants.

(iii) The Court held that recovery under Section 1983 is possible only if at the time of defendants' conduct their actions violated settled, indisputable law, even though they acted in good faith; further holding that the fulcrum is the existence of clearly established judicial decision that make the act unconstitutional. In the present case, Exhibits K and N clearly establish that the defendants' own Departmental Regulations allowed plaintiff John Doe to inspect his child's medical records. There was nothing unconstitutional about the law! It was as constitutional as any other valid law. The settled, indisputable interpretation of that law was that the right to inspect existed and defendants had no discretion to

exercise in the matter. That's what defendants were told by their own counsel--who presumably had all of the facts given to him by defendants, including any facts which might have been the basis for exercise of the State's parens patriae power. What the Court failed to consider is that the actions of the defendants amounted to a refusal to give equal protection of that law to the plaintiffs and their daughter. Defendants would not comply with the law in respect to plaintiffs. They knew or should have known that the law is well-settled and indisputable that failure to give equal protection of the law is unconstitutional. No case citation is needed to establish this.

(iv) Moreover, recovery under Section 1983 is possible in this case because defendants' actions violated settled, indisputable law that no person may

be deprived of his constitutional rights or property rights without due process of law--and defendants knew or should have known that. At a time when defendants were not entitled to exercise any custodial or guardianship rights over plaintiffs' child, and at a time when plaintiffs had all of the constitutional rights of parents to care for and protect their child, defendants acted without due process of law to infringe plaintiffs' constitutional rights to act to care for their child. Before defendants had such power to act, they had to obtain it by due process of law--which they clearly did not do. What this Court failed to consider is that State actions taken without due process of law are unconsitutional regardless of whether the officials taking such action in good faith believe that the specific statute that they are

enforcing is constitutional.

(v) The Court arbitrarily assumed that defendants could use their own ignorance of the law and their own untrained opinions about law as a shield which enables them to act without due process of law to enforce their own view about what the law should be, so long as they act in apparent good faith and personally know of no judicial decisions to the contrary. Such a view seems to be in conflict with the constitutional form of government of enumerated powers and constitutional rights of individuals.

b) In so ruling, this Court failed to consider the issue of whether defendants could be found to be in good faith if the complaint is construed most favorably to plaintiffs.

(i) Defendants were officials of the Massachusetts Department of Mental

Health, acting as psychotherapists and hospital and departmental administrators. None of them were lawyers or trained in law or legal research or statutory interpretation.

(ii) The Department of Mental Health has an official Legal Department which has official responsibility for advising the Departmental officials on the law that is applicable to them.

(iii) The Departmental Legal Counsel advised them (Exhibits K and N) that Departmental Regulations and the statute entitled plaintiff John Doe to see his child's mental health records.

(iv) Defendants sought no other legal advice on the subject, even though the Attorney General of the Commonwealth was available to them for such an opinion. Defendants did not initiate any judicial process to seek

a determination of the law.

(v) Defendants' rejection of their Departmental Counsel's advice was their own desire to enforce their "policies" and their judgment as to what was best for former patients and their families, without regard for the constitutional rights of those former patients and their families to make their own decisions.

(vi) Defendants' actions were predicated upon a belief that they could fashion the law as they chose within their professional activities, without regard for professional legal opinions of those appointed and paid to give them official advice.

(vii) Defendants' actions are presumably justified in the Court's view so long as defendants have no personal and direct notice of settled, indisputable rules of law to the

contrary, as established by judicial opinions. The Court allows defendants to have immunity on the basis of their ignorance of the law or on the basis of their refusal to accept competent advice on the law. It allows liability under Section 1983 only if the defendants are the subject of direct litigation and direct injunctions--and then the Court will not hold them liable for their actions prior to the entry of the injunctive relief. Clearly, the Court is taking the position that every public official has a license to violate constitutional rights of persons so long as he "in good faith" disregards all competent legal advice given by his own counsel and has his own personal theory of law which to him is justification for his actions. Plaintiffs respectfully submit that that cannot be the law, and is not the law of this case.

Defendants could not be in good faith upon the averments of the complaint.

5. In ruling on the issue of access to medical records and the applicable statute of limitations, this Court applied principles that are not relevant in Massachusetts. Specifically, the Court failed to consider that the relationship of parents and child is analogous to constitutional theories of contract rather than tort. A parent does not have a duty to provide necessaries to his child on any theory of tort. In Massachusetts, a parent's vicarious liability for the torts of children is limited by statute. A parent's liability for payment of necessaries incurred by or for his children, however, is extensive and expands on the basis of many factors. When a parent procures medical care for his child, he does so because he would be legally responsible for that care anyway if the child needed it. The physician does not sue for his fee under any theory of tort, and the

services are not rendered under any theory of tort liability arising if the parent refuses to provide them. The parents' obligation to the physician arises from an implied contract, and the relationship is determined in accordance with rules of contract. The complaint herein, alleges that a contractual relationship was entered into and was relied on by defendants. See Exhibit A, attached to the complaint. The Court disregarded these allegations and failed to consider the issue of contract at all. The Court also failed to decide the question of the 20-year statute of limitations that applies to contracts of the kind entered into herein, based upon the relevance of that statute to G.L. c.123, section 36.

6. The Court notes that the Complaint is deficient under FRCivP Rule 8(a)(2) in that it does not offer a short and plain statement of the facts. The Court suggests that the complaint would be dismissable for violation of Rule 8(a)(2) if it had not

been dismissed on other grounds. Plaintiffs respectfully point out that the complaint alleges that there was prior litigation before the Supreme Judicial Court of Massachusetts upon which this cause of action is predicated. In that case, all of the relevant facts were stipulated by agreement of the parties and considered by the Court. Those same facts appear at complaint pages 6 through 21; and are also contained in 19 pages of exhibits which were also part of the agreed facts in the earlier case. They comprise a total of 35 pages of the 63 pages noted by this Court. They were deemed to be facts which would not be controverted in the present case, and were pleaded verbatim in order to avoid any possibility of controversy that might have arisen if only referred to "briefly" in the complaint. Had they not been pleaded, they would have had to have been the subject of an immediately filed Request to Admit Facts, pursuant to FRCivP Rule 36, in order to forestall a

motion to dismiss or for summary judgment, Plaintiffs respectfully submit that defendants were not confused or inconvenienced by such pleading, since their own present legal counsel stipulated to those same facts in the earlier litigation and cannot be confused or delayed thereby. The specific purpose of the complaint as pleaded herein was to enable the Court to rule on the legal issues quickly, with the expectation that the facts essentially would not be in dispute.

WHEREFORE, upon the grounds above stated, plaintiffs move that the Judgment entered herein on 20 May 1980 be vacated and that this Court reconsider the plaintiffs' Motion for Summary Judgment on the facts and theories argued therein.

Plaintiffs here state for the record that although the Memorandum and Judgment of this Court are dated 20 May 1980, plaintiffs in fact did not receive a copy

thereof until Tuesday, 27 May 1980--apparently due to the slowness of the mails and the intervening Memorial Day holiday. Plaintiffs, pursuant to FRCivP Rule 59(e) are required to file this motion within ten (10) days after the entry of the Judgment herein. Having received notice thereof by mail, pursuant to FRCivP Rule 6(e), three (3) additional days are allowed for the filing of this motion. The last day for the filing of this motion is 2 June 1980. This motion is being filed by mail on 29 May 1980, presumably in sufficient time to reach the court before 2 June 1980. As a precaution, plaintiffs hereby meke a pro forma motion, ancillary to the principal motions set forth herein, that in the event that this motion actually arrives at the court after 2 June 1980, the Court allow the time for filing to be extended to cover the arrival date thereof.

29 May 1980 Respectfully,

Plaintiffs' Attorney
LEONARD ROSE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1422

JOHN DOE and MARY DOE,
Plaintiffs, Appellants,

v.

WILLIAM GOLDMAN et al.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. A. David Mazzone, U.S. District Judge]

Before
Judges Aldrich, Campbell and Bownes.
Circuit Judges.

November 3, 1980

Per Curiam. This 42 U.S.C. sec. 1983 action follows unsuccessful attempts by plaintiff parents to obtain the medical records and writter medical reports of the treatment and condition of their minor daughter while at the Massachusetts Mental Health Center conducted by the Massachusetts Department of Mental Health. The documents were refused at various times for various reasons, culminating in the final refusal by the Commissioner of the Department of

Mental Health in November 1974. Plaintiffs thereafter undertook proceedings in the state courts, and progressed to a degree, but desisted when they were unable to obtain the daughter's consent required by the Supreme Judicial Court, Doe v. Commissioner of Mental Health, 1977, 372 Mass. 534, 362 N.E.2d 920, because she had then reached her majority. The present action was filed in February 1979. The district court dismissed on the merits with an extensive opinion, adding that, in any event, the action was time barred. On this appeal we need go no further than to agree with this latter conclusion.

In determining the applicable limitations period for a section 1983 action, we are, of course, governed by the state statute for the most nearly analogous cause of action in state law. Burns v. Sullivan, 1 Cir., 1980, 619 F.2d 99, 105, cert. denied, 49 U.S.L.W. 3231; Kadar Corp. v. Milbury, 1 Cir., 1977, 549 F.2d 230, 234.

Plaintiffs assert that it is part of a treating doctor's duty to supply the parents of a minor with full medical information. If such failure is a tort, suit must be brought within three years. Mass. G.L. c. 260, §2A.* Plaintiffs contend that the duty arises out of the contract of employment and sounds in contract. If this is so, either Mass. G.L. c. 260, §2A (actions of contract for personal injuries) or §4 (actions for malpractice, whether in tort or contract) must govern; each allows three years.

Plaintiffs do not advance their case by saying that their rights were of constitutional proportions--that is so as to all section 1983 actions, other than those involving federal statutes. Nor is there

* Plaintiffs' strongest argument, and the one which succeeded in the Supreme Judicial Court, is based on the mandatory language of Mass. G.L. c. 123, §36. An action for breach of a duty imposed by law sounds in tort. Graffals Gonzales v. Garcia Santiago, 1 Cir., 1977, 550 F.2d 687, 688.

any substance in their argument that there was a continuing need, and hence a continuing obligation to supply the records. Any unsatisfied obligation normally continues; the statute of limitations is concerned with when it arose. The narrow exceptions--if they be viewed as exceptions--are in unusual instances where there is considered to be a new cause of action each day, such as trespass and nuisance. See White's Farm Dairy, Inc. v. De Laval Separator Co., 1 Cir., 1970, 433 F.2d 63, 67. This is not such an exception.

We agree with the district court that the limitations period applicable to this action is three years, and that it began to run no later than November 14, 1974, the date of the Commissioner's final refusal of the records. At that time plaintiff knew of his rights, if any, and of their rejection. Because the action was not commenced until over four years later, it is time barred. Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1422

JOHN DOE, ET AL.,
Plaintiffs, Appellants,

v.

WILLIAM GOLDMAN, ET AL.,
Defendants, Appellees.

JUDGMENT
Entered November 3, 1980

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
DANA H. GALLUP,
Clerk

By/s/Francis P. Scigliano
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

JOHN and MARY DOE, Plaintiffs-Appellants	]]	
vs.	]	No. 80-1422
WILLIAM GOLDMAN, HALIM MITRY, THEODORE I. ANDERSON WILFRED BLOOMBERG, JACK R. EWALT, AXEL HOFFER, and JOHN NELSON Defendants-Appellees	]]]]]]]]	

PETITION FOR REHEARING

Now come the plaintiffs-appellants in the above-titled appeal and respectfully petition for rehearing of their appeal on the ground that this Honorable Court has overlooked and misapprehended certain points of law and fact in this case, as follows:

1. This Honorable Court decided that a three-year statute of limitations applies to the plaintiffs' cause of action, but overlooked the very recent landmark decisions of the Massachusetts Supreme Judicial Court in Franklin v. Albert, Mass. Adv. Sh. (1980) 2187 and its companion case of Teller v. Schepens, Mass. Adv. Sh. (1980) 2199, which

were decided after briefs and oral arguments were closed in this appeal. Plaintiffs acted expeditiously after oral arguments were closed herein to move for leave to file a supplemental brief to advise the Court of those opinions, but this Court apparently acted before considering those opinions. Those cases reverse existing Massachusetts law on the time when the medical malpractice limitations period begins to run, and hold that the period begins to run only when plaintiff learns or could reasonably have learned of his injury; it does not run from the time that the malpractice occurred. This Court thus misapprehended current Massachusetts law, by ruling that the statute of limitations began to run when defendants' "malpractice" occurred, rather than when plaintiffs found that they had been injured.

2. Although plaintiffs believe that the above opinions of the Massachusetts SJC are sufficient to justify a rehearing of this

appeal, plaintiffs also rely on the ground that this Court has erroneously ruled that all of the defendants are entitled to the benefits of a three (3) year statute of limitations, even though the record is devoid of any factual basis for such a holding. This Court has ruled that the applicable limitations period is three (3) years. That is a ruling of law. To apply it to the present cause of action, there must be a finding of fact that each of the defendants was entitled to the benefit of the running of that statute for an entire three (3) year period after the date of alleged "malpractice". This Court must take into account that Mass. G.L. c.260, §9, qualifies and limits all Massachusetts statutes of limitations by tolling the respective limitations period so long as a defendant is a nonresident. Since a statute of limitations defense must be affirmatively pleaded, a defensive pleading in that regard must in some manner allege that the

defendant was in fact a resident of Massachusetts during the entire limitations period relied on, or it will not adequately plead an affirmative defense. FRCivP Rule 8(c). Merely to recite that a period equal to the relevant limitations period has expired, without alleging that the defendant was factually entitled to the benefit of the statute during that period, is not enough to prove a defense.

In the present case, the defendants in their motion to dismiss could not have relied upon defensive matters which were outside of the complaint. Gomez v. Toledo, U.S. (1980), 100 S.Ct. 1920. In order to properly rely upon a statute of limitations defense, they had to have filed an answer in which they affirmatively pleaded facts to support such a defense or they should have filed a motion for summary judgment based upon their respective defensive affidavits that they each were residents of Massachusetts during the entire three (3) year

period relied on. Plaintiffs filed a motion for summary judgment in the trial court, but the defendants did not file any countermotions for summary judgment on the basis of affirmative allegations of fact or any affidavits that they each were factually entitled to the benefit of the applicable statute of limitations. In fact, defendants filed no counteraffidavits at all. This Honorable Court thus has no facts now before it which support an affirmative statute of limitations defense on the record. Whatever may be the length of the proper limitations period, it is a separate issue whether any defendant ought to have the benefit of it.

In fact, the original records in this case show that the defendant GOLDMAN was served with process in California--not Massachusetts; and the defendant EWALT was served with process in the District of Columbia--not Massachusetts. (Plaintiffs rely upon such records for purpose of this Petition for Rehearing. FRAP Rule 30(a).) Thus,

there can be no presumption that either defendant was a resident of Massachusetts for a full three years after the alleged limitations period began to run. Plaintiffs in good faith represent to this Honorable Court that they believe that the facts are that each of those two defendants became a nonresident of Massachusetts before the three year limitations period (as determined by this Court) expired. It necessarily follows that this Court cannot at this time properly rule that any of the defendants--and the defendants GOLDMAN and EWALT in particular--are entitled to a statute of limitations defense in fact.

This Court will note that the factual questions relating to the statute of limitations were not properly raised or properly before the trial court before this appeal was filed, and therefore the plaintiffs have not had the opportunity to oppose such a defense on the facts. Therefore, arguendo, even if this Court were not to recognize

that a substantive change in Massachusetts laws has been made pertaining to the time that a medical malpractice statute of limitations begins to run, this Court still must recognize that plaintiffs have not had an opportunity to oppose defendants' statute of limitations defense on the facts. At the least, this case should still be referred back to the trial court for a determination of whether defendants factually are entitled to the statute of limitations defense they claim. Again, arguendo, even treating defendants' opposition to plaintiffs' motion for summary judgment as an independent motion for summary judgment without affidavits, the presence of disputed facts would warrant a denial of summary judgment in fabor of defendants at this time in this case.

ARGUMENT

This Honorable Court in deciding the within appeal has determined that the most nearly analogous statute of limitations to be used

to determine the appropriate federal limitations period to be applied to the plaintiffs' civil rights action is the Massachusetts statute of limitations in medical malpractice tort cases. In deciding what Massachusetts law provides in such cases, this Court relied on cases which were in effect at the time of oral argument by the parties hereto, but which were totally overruled by the Supreme Judicial Court of Massachusetts before this Court entered its judgment herein. The landmark decisions of the Massachusetts Supreme Judicial Court in Franklin v. Albert, Mass. Adv. Sh. (1980) 2187, and its companion case of Teller v. Schepens, Mass. Adv. Sh. (1980) 2199, are directly applicable to the issues here decided. They controvert the interpretations of Massachusetts law applied by this Court, and should be considered by this Court before the dicision in this appeal becomes final.

Until Franklin v. Albert, supra, was

decided, it was Massachusetts law that a medical malpractice cause of action accrues at the time that the malpractice occurs and not when the injury is discovered. That principle was relied on by defendants and this Court in this appeal. Franklin has now reversed that principle of law. It is now Massachusetts law that medical malpractice causes of action accrue when the plaintiff learns, or reasonably could have learned, that he has been harmed by the defendants' conduct.

It is important that this Court recognize that the Massachusetts Supreme Judicial Court did not rule that the cause of action accrues simply when the plaintiff learns of the malpractice itself but before he knows he has been injured. The holding of the Supreme Judicial Court is that the cause of action accrues when the plaintiff learns, or reasonably could have learned, that he has been harmed by defendants' conduct. Where a plaintiff believes that malpractice

occurred but cannot see that he has been harmed by it, his cause of action does not accrue and the applicable statute of limitations does not begin to run.

Within the context of the Franklin decision, it is obvious that where the patient is an adult, competent, and capable of making practical judgments about the efficacy of treatment being given, and is capable of at least sensing when a malpractice or other tort has occurred, and is capable of learning later that an injury then occurring is causally related to the former treatment, the statute of limitations ought to begin to run when the patient has been injured, and knows or is bound to know he has been injured, and can reasonable connect the injury to the earlier malpractice. Presumably, an adult at the time of learning of the injury will have a substantial memory or records from which to testify at a medical malpractice trial. This is not the situation where a minor child is the

patient, particularly where the minor child is or has been under treatment for an emotional illness. The child's knowledge cannot be imputed to his parent or guardian where the parent or guardian has no actual knowledge of the facts.

This Honorable Court will recognize that hospitalized mental patients, and hospitalized minor mental patients in particular, cannot be presumed as a matter of law to be fully aware and capable of observing objectively their treatment and care. A minor patient under such circumstances does not have the knowledge or perception to understand what medical malpractice is in concept or to recognize it in practice. The fragmented memories of such a minor patient would provide a poor basis for competent, reliable testimony needed at a later medical trial, even if the trial took place after the patient became an adult. As a practical matter, it would be virtually impossible for such a patient later

causally to connect the injury with any aspect of the hospital treatment if the treatment records were concealed and kept confidential from the patient--as defendants during oral argument on this appeal declared they as State officials have power to do, even against the patient's wishes. Some adult must act as surrogate for the helpless or immature patient in order to make the objective observations and to take the actions needed to protect and preserve the then available evidence that may later establish the culpability which is causally related to the damage that later is discovered. For a minor patient, the surrogates must be the parents or guardians. To prevent them from so acting is to make it possible for physicians and psychiatrists to conceal all or most malpractice inflicted on the child patient. The Massachusetts Supreme Judicial Court has now recognized this principle by holding that the statute of limitations begins to run when the

injury is or can reasonably be discovered.

A hard and fast arbitrary rule would be inappropriate for use as an analogy to establish a proper federal limitations period to be applied to the facts in the present case. The Massachusetts Supreme Judicial Court has now made it clear that Massachusetts law does not impose any fixed or rigid limitations period in tort situations such as the one which this Court finds here. In Franklin v. Albert, supra, the Supreme Judicial Court held:

> "Absent explicit legislative direction, the determination of when a cause of action accrues, causing the limitations to run, has long been a product of judicial interpretation in this Commonwealth. (citations omitted) It was this court, not the legislature, that decided in 1929 that a malpractice claim accrued when the physician performed the negligent act. (citation omitted) This court is not barred from departing from that rule if persuaded that the values in so doing outweigh the values underlying stare decisis.
>
> "The manifest injustice of the (old) doctrine is that, rather than punish negligent delay by the plaintiff, it punishes 'blameless ignorance' by holding a medical malpractice action time-barred before the plaintiff could

reasonably know of the harm he has suffered. ..."

This Court has ruled that the Massachusetts statute of limitations for medical malpractice cases is applicable by analogy to the plaintiffs' cause of action. That statute must thus be interpreted in accordance with the opinion in Franklin v. Albert, supra.

If this Court judicially determines the federal statute of limitations for this civil rights case by applying the most nearly analogous State limitations period, and applies the limitation statute that pertains to actions of contract for personal injuries (G.L. c.260, §2A), this Court ought to exercise the same freedom as the State court to depart from past rules applied in similar or analogous cases if it is persuaded that the values in so doing outweigh the values underlying stare decisis.

In order to determine whether the doctrine of stare decisis is involved in this case,

it is worth noting that even if the medical malpractice/tort analogy is or appears to be most nearly appropriate for this case, there are many distinct differences between the ordinary medical malpractice case and the present cause of action. In the ordinary malpractice/tort case, the plaintiff was the patient and the injury suffered was sustained directly as a result of the failure to provide proper treatment. In such cases, the defendant is usually the treating physician alone. In the present case, the plaintiffs-parents were never the patients of the defendants and only one of the seven defendants was the treating psychiatrist; the rest were administrative officials. Lastly, the plaintiffs' injuries were suffered as a result of defendants' action after treatment of the patient ended, not during treatment. The injury to the plaintiffs-nonpatients occurred when their right to have a continuing family/parental relationship with the patient was interfered

with by defendants through their refusal to provide medical reports, advice, guidance or access to records which would have enabled the plaintiffs to make parental judgments which would have preserved their ability to try to relate to the child. So, clearly, this case is not similar to the usual malpractice/tort case and the stare decisis doctrine is not threatened or in any way involved. The factual basis for plaintiffs' civil rights claims is not similar to that of any other cases cited by either party. It appears to be a case of first impression. Therefore, this Court can judicially determine the appropriate limitations period and determine when it begins to run without being constrained by the doctrine of stare decisis. Franklin v. Albert, supra, clearly points the way.

In Teller v. Schepens, Mass. Adv. Sh. (1980) 2199, a companion case to Franklin v. Albert, supra, the plaintiff was injured as a result of eye operations. In that

case, the Supreme Judicial Court held that it could not be said that plaintiff's cause of action was time-barred as a matter of law because the plaintiff should have learned of the failure of the eye operations and of the permanent loss of his sight before he was discharged from defendant's care.

Teller v. Schepens, supra, thus teaches that in Massachusetts a patient cannot be held as a matter of law to have learned or to have been reasonably able to learn of a malpractice or of the permanent nature of his damages at any fixed point in time. Such a claim will not be barred simply because of the passage of time after the malpractice occurred.

In the present appeal, the nature, form and effect of the treatment, if any, that was given by defendants to plaintiffs' minor child is still unknown. If there was malpractice in respect to their child

which resulted in the child developing a destructive relationship with the plaintiffs, the defendants have effectively prevented plaintiffs from learning about it. On that, the record is clear. The time that plaintiff first became aware that they had suffered a permanent loss was when their minor daughter attained her majority and the Supreme Judicial Court shortly thereafter ruled that plaintiffs were no longer by statute entitled to inspect her medical records--while that court refused to rule on plaintiffs' parallel claims that they had constitutional rights as parents to have such information and reports.

Until April 1977, so long as their daughter was still a minor, the plaintiffs had the constitutional rights and duties to provide for her care, support, education and welfare. When their child reached her majority, plaintiffs lost those rights. So long as the child was a minor, plaintiffs reasonably believed that they could assert

parental rights to demand medical reports, advice, guidance, data or the right to obtain the same by inspecting her medical records. They thus had the reasonable continuing hope to be able to be able to prevent the permanent loss of all relationship with the child, even though it seemed to be deteriorating. In July 1977, when the Supreme Judicial Court issued its rescript in the previous litigation (App.40), the plaintiffs lost all of their statutory rights to demand that information from the defendants and were denied any ruling or remedy in respect to their constitutional rights. Since this Court has decided to apply a tort/medical malpractice analogy in order to determine the time when plaintiffs' cause of action accrued in the present case, by analogy to Massachusetts law, it must have accrued in July 1977 when plaintiffs became aware that their loss of relationship with their child was permanent and that there was nothing that they could do

to learn how they might have prevented it or could restore it. Since the present cause of action was filed in February 1979 (App 2), even the fixed three (3) year tort statute of limitations of Massachusetts had not yet run when plaintiffs' civil rights action was filed. Therefore, the statute of limitations defense of the defendants must be rejected by this Court, both on the facts and the law.

WHEREFORE, plaintiffs-appellants respectfully petition this Honorable Court for a rehearing of their appeal, and for this Court to grant the relief which plaintiffs requested in their briefs.

Respectfully,

Plaintiffs-appellants'
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1422

JOHN DOE and MARY DOE
Plaintiffs, Appellants,

v.

WILLIAM GOLDMAN et al.,
Defendants, Appellees.

Before
Judges Aldrich, Campbell and Bownes,
Circuit Judges,

Memorandum and Order
on Petition for Rehearing
Entered November 19, 1980

The petition for rehearing is denied.

1. The court did not overlook the cases of Franklin v. Albert and Teller v. Schepens. On the contrary, because of them it added, before issuance, the penultimate sentence to the opinion: "At that time plaintiff knew of his rights, if any, and of their rejection." This sentence inadvertently erred in referring to the plaintiffs in the singular; it is otherwise correct. The fact that plaintiffs may not have realized until later that defendants' rejection of

their rights, if any, might have greater consequences than they anticipated, might affect the damages, but does not qualify the cause of action, or create a new one.

2. Defendants showed a prima facie case with respect to the statute of limitations. The burden shifted to plaintiffs to show it was tolled. Molinar v. Western Elec. Co., 1 Cir., 1975, 525 F.2d 521, 531 n.6, cert. denied, 424 U.S. 978 (applying Massachusetts law); Ford v. Rogovin, 1935, 289 Mass. 549, 533, 194 N.E. 719, 721. This they did not do. Evidence that two defendants were served elsewhere outside the state does not establish that they were outside during the initial three years. Nor does Jane Doe's minority suffice; it is not her cause of action that is being pursued.

It is too late for plaintiffs to raise a new point, let alone amend the record.

By the Court
DANA H. GALLUP, Clerk
By/s/Francis F. Scigliano
Cheif Deputy Clerk.

80-1398

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MAY 11 1981
ALEXANDER L. STEVAS,
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No. 18-1398

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

John Doe and Mary Doe,
Petitioners

v.

William Goldman, Halim Mitry, Theodore I. Anderson, Wilfred Bloomberg, Jack Ewalt, Axel Hoffer, and John Nelson,
Respondents

Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR THE WRIT OF CERTIORARI

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TABLE OF CONTENTS

Question Presented 1

Additonal Statutes Involved 2

Statement of the Case 5

Summary of the Argument 12

Argument 17

I. The Petition Properly Presents Only The Question Whether the Action Is Time-Barred. 12

II. No Special Or Important Issue Meritting Review By This Court Is Raised By the Decision Below 18

A. The Court Properly Rejected Petitioners' Belated Tolling Argument. 19

B. The Court Properly Applied Massachusetts Law In Ruling That the Action Accrued No. Later Than November, 1974. 25

C. The Court Properly Applied a Three-Year Period of Limitation. 33

III. The Petition Should Be Denied With Respect to Issues Not Decided By the Court of Appeals. 35

Conclusion 41

TABLE OF AUTHORITIES

Cases

Bane v. Superintendant of Boston State Hospital, 350 Mass. 637, 216 N.E. 2d 111 (1966) 34, 39

Board of Regents v. Tomanio, 446 U.S. 478 (1980) 28,31

Carey v. Piphus, 435 U.S. 247 (1978) 32

Doe v. Commissioner of Mental Health, 372 Mass. 534, 362 N.E. 2d 920 (1977) 10, 36

Ford v. Rogovin, 289 Mass. 549, 194 N.E. 719 (1935) 20

Franklin v. Albert, Mass. Adv. Sh. 2187, 411 N.E. 2d 458 (1980) passim

Graffals v. Garcia Santiago, 550 F.2d 687 (1st Cir. 1977) 35

Hendrickson v. Sears, 365 Mass. 83, 310 N.E. 2d 131 (1974) 29

Huddleston v. Dwyer, 322 U.S. 232 (1944) 26, 40

Jess v. Great Northern Ry., 401 F.2d 535 (9th Cir. 1968) 38

Kazan v. Comstock, 270 F.2d 839 (5th Cir. 1959) 35

Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974) 38

Mansfield v. GAF Corp., 5 Mass. App. Ct. 551, 364 N.E. 2d 1292 (1977) 30, 31

Molinar v. Western Elec. Co., 525 F.2d 521 (1st Cir.1975) 20

NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) 17, 35

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 37

Rzezaick v. Chief of Police of Southampton, 374 Mass. 475, 373 N.E. 2d 1128 (1978) 32

Stickney v. E.R. Squibb & Sons, Inc., 377 F. Supp. 785 (M.D. Fla. 1974) 38

Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978) 38

Teller v. Schepens, Mass. Adv. Sh. 2199, 411 N.E. 2d 464 (1980) 25, 29

Walsh v. Ogorzalek, 372 Mass. 271, 361 N.E. 2d 1247 (1977) 22, 24

Williams v. Walsh, 558 F2d 677, (2nd Cir. 1977) 33

Woodcock v. American Investment Co., Mass. Adv. Sh. 2287, 380 N.E. 2d 6245 (1978) 24

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 21

Statutes and Court Rules

United States Code

42 U.S.C. §1983	2, 31

Massachusetts General Laws

c. 123, §10	2, 39, 40
c. 123, §11	3, 29, 40
c. 123, §36	4, 9, 40
c. 223A, §3	4, 23
c. 223A, §4	4
c. 260, §1	33
c. 260, §2A	34, 35
c. 260, §4	34
c. 260, §9	23
Stat. 1970, c. 888, §4	4, 34, 39
Stat. 1974, c. 348	9

Supreme Court Rules

Rule 18	36

Federal Rules of Civil Procedure

Rule 4	13, 24
Rule 12	5

Miscellaneous

Note, Collateral Estoppel of Nonparties, 87 Harv. L. Rev. 1485 (1974) 38

No. 18-1398

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October Term, 1980

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Respondents

Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR THE WRIT OF CERTIORARI

QUESTION PRESENTED

Did the Court of Appeals err in affirming a judgment dismissing this action upon the ground that the state's three-year period of limitation for

certain tort and contract actions barred an action under 42 U.S.C. §1983, where the defendants' final refusal to disclose a minor's mental health treatment records to her parents occurred in 1974, and the action for damages stemming from that refusel was commenced in 1979?

Additional Statutes Involved

Massachusetts General Laws

Chapter 123, §10

(a) Pursuant to departmental regulations on admission procedures, the superintendent may receive and retain on a voluntary basis any person providing the person is in need of care and treatment and providing the admitting facility is suitable for such care and treatment. The application may be made (1) by a person who has attained the age of sixteen, (2) by a parent or guardian of a person on behalf of a person under the age of eighteen years .... The superintendent may discharge any person admitted under the provisions of this paragraph at any time he deems such discharge in the best interest of such person,

provided, however, that if a parent or guardian made the application for admission, fourteen days notice shall be given to such parent or guardian prior to such discharge.

...

Chapter 123, §11

Any person retained in a facility under the provisions of paragraph (a) of section ten shall be free to leave such facility at any time, and any parent or guardian who requested the admission of such person may withdraw such person at any time, upon giving written notice to the superintendent. The superintendent may restrict the right to leave or withdraw to normal working hours and weekdays and, in his discretion, may require persons or the parents or guardians of persons to give three days written notice of their intention to leave or withdraw. Where persons or their parents or guardians are required to give three days notice of intention to leave or withdraw, an examination of such persons may be conducted to determine their clinical progress, their suitability for discharge and to investigate other aspects of their case including their legal competency and their family, home or community situation in the interest of discharging them from the facility. Such person may be retained at the facility beyond the expiration of the three day notice period if, prior to the expiration of the said three day notice period, the superintendent files with the district court a petition for the commitment of such person at the said facility.

Chapter 223A, §3

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's

(a) transacting any business in this commonwealth;

(b) contracting to supply services or things in this commonwealth;

(c) causing tortious injury by an act or omission in this commonwealth;

(d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;

...

Chapter 223A, §4

When the exercise of personal jurisdiction is authorized by this chapter, service may be made outside this commonwealth.

St. 1970, c. 888, §4, inserting G.L. c. 123, §36

Section 36. The department shall keep records of the admission, treatment and periodic review of all persons admitted to facilities under its supervision. Such records shall be private St. 1970, c. 888, §4, continued and not open to public inspection except (1) upon proper judicial order whether or

not in connection with pending judicial proceedings, (2) that the commissioner may allow the attorney of a patient or resident to inspect records of said patient or resident if requested to do so by the attorney, and (3) that the commissioner may permit inspection or disclosure when in the best interests of the patient or resident as provided in the rules and regulations of the department. This section shall govern the patient records of the department notwithstanding any other provision of law.

Statement of the Case

Prior Proceedings

Plaintiffs, proceeding pseudonymously, commenced this action in February, 1979, in the United States District Court for the District of Massachusetts. In March, the defendants responded with a motion to dismiss pursuant to Fed. R. Civ. Proc. Rule 12 (b)(1) and 12(b)(6). Plaintiffs countered with a motion for summary judgment on the issue of liability, reserving

damage issues for jury trial. The motions were submitted to the court without oral argument. On May 20, 1980, the court (Mazzone, J.) granted defendants' motion to dismiss, and subsequently denied plaintiffs' Motion to Vacate the Judgment.

Plaintiffs appealed the judgment, and on November 3, 1980, the Court of Appeals (Aldrich, Campbell & Bownes, JJ.) affirmed the judgment with an unpublished per curiam opinion. The court denied plaintiffs' Petition for Rehearing on November 19, 1980. Plaintiffs filed their petition for a writ of certiorari on February 17, 1981.

Statement of Pertinent Facts

As defendants will argue, the only question before the Court is the correctness of the judgments of the courts.

below that this action is barred by the applicable state period of limitation. The facts pertinent to that question (together with background facts) are alleged as follows:

John Doe, an attorney, is the father of one Jane Doe, who was born in April, 1959. Mary Doe is John's second wife and Jane's stepmother, as well as her mother by adoption. (R. 28).[1/]

In June, 1972, when Jane was thirteen, her father voluntarily admitted her to the Massachusetts Mental Health Center in Boston. The "Chief Executive" of the Mental Health Center during the times in issue was defendant Halim

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1/ "R" in this case refers to the Appendix submitted by plaintiffs to the court of appeals, which has been transmitted to this Court.

Mitry. (R.10). Jane remained as a resident in the Center until January 17, 1973, and she returned for one day on March 9, 1973. Her father was billed for the cost of treatment. (R.11).

Between May, 1973, and November, 1974, John Doe made increasingly comprehensive demands upon the Mental Health Center for information about his daughter's condition, treatment, and prognosis. (R. 12-23). Meetings with staff and Dr. Mitry's written summary of Jane's outlook proved unsatisfactory to him, and from July 18, 1973, onward, Mr. Doe demanded a "comprehensive and complete report" of the Center's "findings, diagnosis, treatment and prognosis," or the records themselves. (R. 14, 17).

In June, 1974, the General Court of the Commonwealth enacted a statute giving a right of access to patient records to the patient's attorney. St.

1974, c. 348, amending G.L. c. 123, §36. Thereafter, Mr. Doe invoked this provision, as well as his parental rights, in communications with the Center. Nevertheless, Dr. Mitry refused to permit Mr. Doe to inspect the records, and Mr. Goldman, then the Commissioner of Mental Health, confirmed this decision on November 14, 1974. (R. 20, 22-23).

On November 27, 1974, Mr. Doe filed a complaint for declaratory and mandatory relief in the Supreme Judicial Court for Suffolk County.[2/] (R.9). The parties

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2/ The Court for Suffolk County is the single justice session of the Supreme Judicial Court for the Commonwealth. As a matter of practice, original actions in the Supreme Judicial Court are brought to a single justice for determination whether there is a factual dispute, and for assembly of a record upon which the case can be submitted to the full court.

submitted an agreed statement of facts for the purposes of that action, and the case was reported for decision by the full court. In May, 1977, the court issued its judgment and an opinion holding that the Commissioner of Mental Health must release records to a patient's attorney if the patient validly consents to such disclosure. However, since the validity of the original consent was disputed, and since Jane had attained her majority, the court declined to require disclosure in this case unless she executed a new consent form. The court also declined to pass on constitutional questions raised by the plaintiff. Doe v. Commissioner of Mental Health, 372 Mass. 534, 535 n.1, 537-38, 362 N.E. 2d 920, 921 n. 1 (1977).

Plaintiffs commenced this action in February, 1979, by filing a complaint in

the district court. In addition to the allegations summarized above, the complaint concatenates multiple disparate injuries which are alleged to have flowed from defendants' refusal to release Jane's records. Some of these injuries allegedly occurred in 1974 or 1975 (R. 24-34, 37-39). Some, including a complete cessation of communications with Jane, allegedly occurred in 1977. (R. 35-36). The remaining alleged injuries are not fixed in time. (R. 43, 44).

Summary of the Argument

The court of appeals affirmed the judgment of the district court solely on the ground that the action was barred by the applicable period of limitations. Other issues are not properly before this Court.

On the facts in the record, there was no support for the claim that the limitation period was tolled by reason of two defendants' residency out of state. Since under state law petitioners bore the burden of adducing facts to support the claim, and since the complaint contained allegations supporting the statute of limitations defense, judgment properly entered for the defendants.

There was no abuse in refusing to vacate the judgment and to remand the

case for factual development of the tolling claim, where the claim was not raised until the Petition for Rehearing in the court of appeals, because the statute of limitations defense was unmistakably raised by the respondents in the district court. Moreover, even if the petitioners could show respondents' out-of-state residency during the period of limitation, the period would not be tolled. Under decisions by the Supreme Judicial Court, out-of-state residency tolls the statute only if state courts cannot obtain personal jurisdiction over a defendant. In this case, respondents could have been served anywhere in the United States at any time after the cause accrued by virtue of the state's long-arm statute and Fed. R. Civ. Proc. Rule 4(e).

On the allegations in the complaint, petitioners asserted their alleged parental rights of access to their daughter's treatment records, and were finally and unequivocally refused, by November 14, 1974, at the latest. Thus, there was no error in the judgment that the case had accrued by that date.

There is no merit, factual or legal, in the argument that the cause did not accrue until petitioner had sustained the harm for which they now seek damages. Assuming that, under state law, the cause would not accrue until the injury was or should have been discovered, the instant action accrued when petitioners asserted their parental rights and were denied access to Jane's records.At that point petitioners knew or believed that rights secured by the constitution had been

abridged. Moreover, by their own allegations, they had sustained injuries to their relationship with their daughter of a kind similar to injuries which, they allege, they sustained later. In any event, the discovery rule would not be applied to a case like this, in which the alleged breach of duty was not inherently or practically unknowable.

The argument that a cause accrues under state law only when there is an injury is irrelevant because the actionable injury, if any, was the alleged deprivation of petitioners' constitutional rights, which occurred no later than November, 1974.

The lower courts properly rejected petitioners' claim that their action was governed by a twenty-year period applicable to actions to recover for support of inmates in state institutions. Even

if petitioners' action is contractual in nature, the applicable statute is that governing actions in contract for personal injuries.

If the writ issues, it should be limited to the question actually decided by the court of appeals. Respondents have argued that this action is precluded by the previous state court judgment. Since that argument depends on the proper interpretation of the state court decision, it should be considered first by the lower courts.

Moreover, the petitioners' rights also depend upon their relationship with the respondents, and the relationship depends on questions of state law which should be addressed first by the lower courts.

Argument

I. THE PETITION PROPERLY PRESENTS ONLY THE QUESTION WHETHER THE ACTION IS TIME-BARRED

The Court of Appeals decided but one issue, viz., whether this action is barred by the applicable period of limitation. Nevertheless, the petition purports to present the question whether the complaint states a claim upon which relief can be granted, an issue which was presented to, but not decided by the Court of Appeals. Plainly, if this action is time-barred, it is unnecessary to reach the merits of the complaint. If this action is not time-barred, the Court should not reach the merits until the court of appeals has had an opportunity to pass upon them. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132,

163-64 (1975); cf. Supreme Court Rule 18. While this rule is one of discretion, there is nothing in this case, as respondents will show more fully in Argument III, which calls for an exception.

II. NO SPECIAL OR IMPORTANT ISSUE MERITTING REVIEW BY THIS COURT IS RAISED BY THE DECISION BELOW

Petitioners' objections to the judgment below attack the choice of the applicable period of limitation, the conclusion that their action accrued no later than November, 1974, and the rejection of the claim that the period was or might have been tolled. Respondents will discuss these objections in the order of apparent seriousness.

A. The Court Properly Rejected Petitioners' Belated Tolling Argument.

Respondents unmistakably raised the statute of limitations as a defense in their Motion to Dismiss. (R. 69). The district court unmistakably sustained the defense. (R. 93-94). Nevertheless, petitioners did not plead, submit evidence, or argue that the period was tolled until their Petition for Rehearing in the court of appeals. At that time they noted that service of process on two of the seven defendants had been accomplished out of state, and argued an inference that those defendants had been out of state during the period of limitation.[3/]

3/ Petitioners frankly admit that they do not know whether any of the defendants resided out of state while the limitation period was running. Petition at 59.

The court of appeals denied the Petition for Rehearing because on the record the tolling argument could not be sustained. Under Massachusetts law,

> The burden of proof was on the plaintiff to show residence of the defendant out of the Commonwealth of such character that the time thereof is to be deducted in computing the period of limitation.

Ford v. Rogovin, 289 Mass. 549, 553, 194 N.E. 719, 723 (1935). See Molinar v. Western Elec. Co., 525 F.2d 521, 531 n.6 (1st Cir.), cert. denied, 424 U.S. 978 (1975). Evidence that defendants were served out of state over a year after the period had run is not sufficient to raise an issue concerning whether the period was tolled, see Ford v. Rogovin, 289 Mass. at 554, 194 N.E. at 723, and so the court of appeals held.

Petitioners requested in the alternative that the court vacate the judgment and remand the case, so that they might have the opportunity to make discovery and to introduce evidence showing that the period of limitation was tolled. The court refused to grant the request. Petitioners now argue that they were entitled to that consideration under Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 334-35 (1971).

Zenith Radio does not support petitioners' claim for at least three reasons. First, the petitioners here were "unambiguously called upon to submit a formal plea" raising the tolling claim by the Motion to Dismiss. See id. at 334. Yet they neglected to raise the issue until after the court of appeals had rendered judgment affirming the

dismissal. Second, there is no suggestion that the court of appeals declined to consider the merits of petitioners' tolling claim on the record before it. Compare Id. The problem here was that the record contains no evidence to support the claim. Thus, even granting petitioners the consideration given the plaintiffs in Zenith Radio, the tolling claim was properly rejected.

If Zenith Radio could be read to support the proposition that a case should be opened to permit proof that the period of limitations was tolled, that course would still be inappropriate here, because, as a matter of state law, the tolling statute would not apply under any circumstance suggested by the petitioners. In Walsh v. Ogorzalek, 372 Mass. 271, 274, 361 N.E. 2d 1247, 1250 (1977), the Supreme Judicial Court

construed G.L. c. 260, §9, the tolling statute upon which petitioners rely, to refer only to "a person who by reason of nonresidence is beyond the jurisdiction and process of the court." (Emphasis supplied). Since 1968, Massachusetts has had a statute conferring personal jurisdiction on the courts of the Commonwealth over persons:

> a) transacting any business in this commonwealth;
>
> b) contracting to supply services or things in this commonwealth;
>
> c) causing tortious injury by an act or omission in this Commonwealth;
>
> ...

G.L. c. 223A, §3, inserted by St. 1968, c. 760. Pursuant to G.L. c. 223A, §4, service may be made outside the commonwealth whenever the courts are authorized to exercise jurisdiction. Thus, whether petitoners' case be characterized as

sounding in tort or contract, they could have served process upon the defendants anywhere in the United States at any time between 1973 and the present. Accordingly, even if the defendants were nonresidents for some period of time between 1974 and 1979, that fact would not have tolled the running of the limitations period. Walsh v. Ogorzalek, 372 Mass. at 274, 361 N.E. 2d at 1250. Accord, Woodcock v. American Investment Co., Mass. Adv. Sh. (1978) 2287, 2296 & n.8, 380 N.E. 2d 624, 628 & n.8 (1978) (action in tort barred because filed more than two years after effective date of long-arm statute).[4/]

4/ The same result would obtain if one looked to the availability of nationwide process in federal court. For, Rule 4(e) of the Federal Rules of Civil Procedure allows service of process on out of state defendants in any manner authorized by the law of the forum state.

For these reasons, there was no error in overruling petitioners' tolling claim, or in declining to permit them to enter a formal plea and submit proof on the tolling issue.

B. The Court Properly Applied Massachusetts Law In Ruling That The Action Accrued No Later Than November, 1974.

The Court of Appeals ruled that the cause of action in this case accrued "no later than November 14, 1974, the date of the Commissioner's final refusal of the records." In their Petition for Rehearing, petitioners requested that the court reconsider its decision on this point in light of two intervening decisions by the state Supreme Judicial Court, Franklin v. Albert, Mass. Adv. Sh. (1980) 2187, 411 N.E. 2d 458 (1980), and Teller v. Schepens, Mass. Adv. Sh.

(1980) 2199, 411 N.E. 2d 464 (1980). The court of appeals ruled that those cases did not affect its judgment.

In Franklin v. Albert, the Supreme Judicial Court ruled that a cause of action for medical malpractice accrues when the plaintiff discovers or reasonably should discover his injury. Petitioners take this ruling to refer to the injury qua consequential damages, rather than the injury qua breach of duty. Thus, they argue that their cause of action accrued on the date on which they discovered or should have discovered that they themselves had sustained some consequential damage.

It would be enough to say that the rejection of this interpretation by the court of appeals is not manifestly wrong. Supreme Court Rule 17.1(a). See Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) (Court

will not review decision concerning state law which is not in clear conflict with authoritative ruling of state court). Nevertheless, a moment's consideration of petitioners' argument will show that the court of appeals was manifestly right.

First, assuming that the so-called discovery rule adopted in Franklin v. Albert would be applied to an action like this, the cause of action would accrue when the petitioners first learned or should reasonably have learned of their injury. The injury for which petitioners seek redress is the alleged interference with rights secured by the federal constitution or laws, in this case their parental rights. The complaint, which incorporates stipulations filed in the Supreme Judicial Court, alleges that Mr. Doe asserted his rights

as a parent to have access to his daughter's treatment records in communications with the respondents in 1973 and 1974. (R.15-16). The complaint also alleges that respondents unequivocally refused to allow access; and that refusal must be taken as having become final by November, 1974, when Commissioner Goldman's letter precipitated the state court action. (R. 9, 23). Cf. Board of Regents v. Tomanio, 446 U.S. 478, 490-92 (1980) (pendency of state court action does not toll limitation period governing action under 42 U.S.C. §1983). In short, the complaint itself alleges petitioners' belief, in 1973 and 1974, that respondents were infringing their parental rights. Accordingly, accepting the applicability of the rule in Franklin v. Albert, the cause accrued no later

than November, 1974, and was barred after November, 1977.

However, it is reasonably clear that the rule established in Franklin would not be applied in a case where the breach of duty, if any, is immediately known. Both Franklin and Teller v. Schepens were cases in which the alleged breach was not reasonably knowable when it occurred. Medical malpractice, like legal malpractice, is committed out of the patient's or client's view, and is not likely to be recognized except by the injury which it causes. See Hendrickson v. Sears, 365 Mass. 83, 90, 310 N.E.2d 131, 135 (1974). Because for practical purposes the breach of duty remains unknown until the injury is discovered, the Supreme Judicial Court has ruled that the cause of action accrues when the injury is discovered.

See also Mansfield v. GAF Corp., 5 Mass. App. Ct. 551, 555, 364 N.E.2d 1292, 1295 (1977)("The discovery rule is designed to postpone the accrual date of causes of action when the defect is "inherently unknowable'"). Since the alleged breach in this case was not only knowable, but also admittedly known, there is simply no basis in policy for applying the discovery rule in this case. For this reason as well, the court of appeals correctly affirmed the judgment.

Petitioners argue that the decision in Franklin should govern this case because some at least of the injuries alleged did not occur until 1977. Thus, for instance, they allege that the loss of their relationship with Jane became irrevocable when the Supreme Judicial Court refused to give access to her treatment records. (R. 39, 43, 44). As the court of appeals pointed out, this

argument depends upon a confusion of the breach of duty with consequential damages. Moreover, an almost identical argument was flatly rejected in Mansfield v. GAF Corp., 5 Mass. App. Ct. at 555, 364 N.E.2d at 1295. (action against the installer of a roof accrued no later than the date upon which a defect, however slight, was discovered). Since petitioners allege injuries to themselves as parents antedating November 1974 (e.g., R. 24, 24, 28), the judgment of the court of appeals was required by Mansfield.[5/]

5/ Petitioners state that, in 1974, they foresaw injury to Jane but not to themselves, and that they were not injured until the Supreme Judicial Court's judgment foreclosed access to their daughter's records. Petition at 7-8, 10. If petitioners intend to argue that the cause of action under 42 U.S.C. §1983 did not accrue until they had exhausted their state court remedies, that argument is foreclosed by Board of Regents v. Tomanio, 446 U.S. 478 (1980).

It is irrelevant that damages continued to build as time passed. The actionable injury in this case was the alleged interference with petitioners' parental rights. Infringement of those rights was evidently actionable whether or not petitioners suffered serious harm. See Rzeznick v. Chief of Police of Southampton, 374 Mass. 475, 484-86, 373 N.E.2d 1128, 1134-35 (1978) (cause of action for infringement of constitutional right existed even absent substantial harm). Cf. Carey v. Piphus, 435 U.S. 247, 266-67 (1978).[6/]

6/ The court of appeals and the district court both ruled that this action would not be classified as a continuing tort under state law. Under that doctrine a new action would accrue each day the wrong -- typically, a trespass -- continued unabated. Although petitioners do not in terms challenge those judgments, their argument that the cause

(footnote continued)

C. The Court of Appeals Properly Applied A Three-Year Period of Limitation.

Petitioners argue that their action is governed by the twenty-year period of limitation for "Actions under section ninety-six of chapter one hundred twenty-three [of the General Laws] to recover for the support of inmates in state institutions." See G.L. c. 260, §1. It is a sufficient answer to this argument that petitioners' action is not one to recover for the support of inmates. To

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footnote continued

accrues when some substantial harm occurs in practically equivalent to a continuing tort theory. The argument thus runs against settled law as found by the court of appeals. It also contravenes any federal policy of repose. See, e.g., William v. Walsh, 558 F.2d 667, 673-75 (2d Cir. 1977).

the extent that petitioners assert rights that are contractual in nature, their action is governed by G.L. c. 260, §2A ("actions of contract to recover for personal injuries ... shall be commenced only within three years next after the cause of action accrues"), or G.L. c. 260, §4 ("Actions of contract ... for malpractice, error or mistake ... shall be commenced only within three years next after the cause of action accrues").

Respondents do not mean to concede that this action is contractual in nature. First, it is plain that any contract was with the Center rather than the defendants. Second, when Jane entered the Center, it was settled law that neither she nor her parents had a right of access to her treatment records. St. 1970, c. 888, §4; Bane v. Superintendant of Boston State Hospital, 350 Mass. 637, 216 N.E. 2d 111 (1966).

Moreover, to the extent that petitioners may now rely on statutory rights, their action sounds in tort. See Graffals v. Garcia Santiago, 550 F.2d 687, 688 (1st Cir. 1977); Kozan v. Comstock, 270 F.2d 839, 844-45 (5th Cir. 1959). The period of limitations for such tort actions is three years. G.L. c. 260, §2A.

III. THE PETITION SHOULD BE DENIED WITH RESPECT TO ISSUES NOT DECIDED BY THE COURT OF APPEALS.

If the Court decides to issue the writ of certiorari to the court of appeals, it should limit the issues to be decided to those fairly comprised in the decision by the court of appeals. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 163-64(1975). While the claim that respondents infringed petitioners' parental rights has superficial appeal, the case is not of such "imperative

public importance" that the Court should hear it before the court of appeals has had an opportunity to render its judgment. Cf. Supreme Court Rule 18. On the contrary, this action simply seeks compensation for past wrongs which are, by petitioners' averments, now irreparable.

Moreover, the petitioners' claim may be precluded by the state court judgment. Although the Supreme Judicial Court expressly declined to reach constitutional issues, those issues, as well as a claim for damages, were raised by Mr. Doe in the case. See Doe v. Commissioner, 372 Mass. 534, 535n.1, 538, 362 N.E. 2d 920, 921n.1, 922 (1977). As petitioners allege, the case was reported for decision on an agreed statement. (R.5). The record did not contain adequate support for Mr. Doe's claim for

damages. 372 Mass. at 538, 362 N.E. 2d at 922. Thus, the only question presented was whether Mr. Doe was entitled to prospective relief. Since Jane had attained her majority, Mr. Doe's parental rights as of the date of the judgment were not in issue.7/

On these facts, petitioners' action may be precluded by the previous state court judgment, even though the state court did not address the present issues, because Mr. Doe chose to abandon those claims in the course of the state court action. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327-28 (1979);

7/ More accurately, the Supreme Judicial Court must have decided implicitly that Mr. Doe's rights as a parent, if any, to see his daughter's records ceased when she became an adult. Petitioners appear to agree with this point. Petition at 11.

Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103, 1107-09 (1st Cir. 1978); Lovely v. Laliberte, 498 F.2d 1260, 1263 (1st Cir. 1974). Since Mary Doe's claim depends exclusively upon the facts alleged in state court, her claim should likewise be precluded. See Jess v. Great Northern Ry., 401 F.2d 535, 536 (9th Cir. 1968); Stickney v. E.R. Squibb & Sons, Inc., 377 F. Supp. 785, 788 (M.D. Fla. 1974); Note, Collateral Estoppel of Nonparties, 87 Harv. L. Rev. 1485, 1501-04 (1974). Respondents submit that the court of appeals and district court should be permitted to address this question before the petitioners' substantive claim is decided.

In addition, the Court should not hear petitioners' constitutional claim before the lower courts have addressed it because it is by no means clearly

presented on the allegations in the complaint. For instance, there is no element of state coercion in this case. Mr. Doe voluntarily committed his daughter; the commitment was terminable at will;[8/] there is no allegation of forced treatment of Jane; and there is no allegation of malpractice. Furthermore, when Mr. Doe, an attorney, committed his daughter, he had notice if not knowledge that neither he nor his daughter was entitled as of right to see her records. St. 1970, c. 888, §4; Bane v. Superintendant of Boston State Hospital, 350 Mass. 637, 216 N.E. 2d 111 (1966).

In short, the relationship between petitioners and respondents was not different in character from that between parents and a private psychiatrist whom

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8/ Voluntary commitments are governed by G.L. c. 123, §§10, 11.

they engage to treat their child.[9/] In these circumstances, it is doubtful that the Constitution speaks definitively on the issue which petitioners seek to raise. However, it is at least clear that the constitutional issue arises from a relationship ordered by state law; and the Court should not reach that issue until the court of appeals (and the district court) have had the opportunity to clarify the relationship. Huddleston v. Dwyer, 322 U.S. at 237-38.

9/ The criterion which guided respondents' treatment of Jane and disclosure of her records, was "the best interests of the patient." See G.L. c. 123, §§10, 11, 36.

Conclusion

For the reasons stated, the petition for the writ of certiorari should be denied. If the petition is granted, the Court should limit the grant to the question whether the action is barred by the applicable state period of limitations.

Respectfully submitted,

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No. 80-1398

in the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN DOE, and
MARY DOE,
Petitioners

vs.

WILLIAM GOLDMAN,
HALIM MITRY,
THEODORE I. ANDERSON,
WILFRED BLOOMBERG,
JACK EWALT,
AXEL HOFFER, and
JOHN NELSON
Respondents

Petition for Writ of Certiorari to the
U.S. Court of Appeals for the First Circuit.

REPLY TO MOTION TO DISMISS

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Petitioners

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REPLY ARGUMENT - Introduction

The trial court dismissed the complaint as a result of a motion to dismiss filed by the defendants-respondents. Therefore, any review of the facts must be based solely on the allegations of the complaint, construing them most favorably to the plaintiffs-petitioners. Neither the trial court nor the court of appeals did so. Both tended to favor the concept that defendants had the right and power to refuse to give any information to the plaintiffs-parents without using any form of due process in order to exercise that power. Moreover, neither the trial court nor the court of appeals construed the facts most favorably to the parents in order to make a determination of when the parents, as distinguished from the child patient, had been damaged, or when the parents under the circumstances of the case should have been aware that they

themselves had suffered injury. Finally, neither the trial court nor the court of appeals dealt with the issue of giving a favorable construction of the facts where the parents could not obtain definitive advice or opinions from the defendants, where the facts available to the parents were susceptible of many interpretations at the time.

The issue which arose out of the trial court action was whether the plaintiffs had stated a prima facie cause of action under 42 U.S. Code 1983, and whether the motion to dismiss was proper. That issue was timely raised in the trial court by motion (App.27-53,R.96-112) which was denied without opinion (R.114). The issue was preserved on appeal in the briefs, and in the petition for rehearing (App.62) when the court of appeals refused to rule on that question and instead held that there was a statute of

limitations which applied (App.79-80).

This Honorable Court will note that respondents have refused to address this issue in their brief. They have not even referred to the holding of this Court in GOMEZ v. TOLEDO, 446 U.S. (1980), 100 S. Ct. 1920, in their arguments. Obviously, they have no argument to make, and they have tacitly conceded that the trial court was in error to grant their motion to dismiss.

If the trial court's dismissal of the case was improper, under GOMEZ, supra, the case was still ripe for judgment on the merits because of plaintiffs' timely motion for summary judgment and supporting affidavit (R.72-78) on the issue of liability. No counteraffidavits were filed, so the facts alleged by the plaintiffs were not in dispute, and the trial court was bound to rule on all of those facts, as

presented. The only issues were issues of law. The case is still ripe for final judgment on the issue of liability for the same reason. The issues as seen by the respondents are limited to the questions as to whether the action is time barred. Certainly, that question was raised and is among those that should be considered. On the basis of the undisputed facts, however, it is reasonable to conclude that the parents' cause of action was not time barred, and the other more important issues need to be addressed by this Court.

ARGUMENT

Additional Statutes involved.

Mass. G.L.c.123, sections 10 and 11 are not relevant. It is undisputed that JOHN DOE voluntarily admitted his daughter JANE to the Massachusetts Mental Health Center as a minor resident patient, and that she was treated there

for seven months and then voluntarily released by defendants back to the care of her parents. Defendants never raised any issue about any restriction on the release of the child or about the family situation or the parents to whom she returned. The issues in this case all arose after the child had been discharged, when the parents asked for information, advice and guidance from defendants so that they as parents could provide care for the child after discharge. (R.49). JOHN DOE also later asked for various information so that he could act in pending cases (Complaint par.36, R.17; R.49,65) involving JANE's personal interests as her attorney. Sections 10 and 11 are irrelevant.

Respondents have quoted Mass. St.1970, c. 888, sec.4, which inserted G.L. c.123, section 36, as part of Massachusetts law. But this version of the statute <u>was not in effect</u> in 1974, when plaintiff JOHN DOE

sought to enforce it against defendants. The language of G.L.c.123, section 36, had been amended by St.1974,c.348, to make it mandatory that defendants permit JANE DOE to inspect his minor daughter's medical records. The old law made discretionary the matter of inspection by an attorney. Petitioners suggest that the reference to the old statute is improper and irrelevant.

Statement of Pertinent Facts.

Respondents' characterization (R/B8) that

> "Between May, 1973, and November 1974, John Doe made increasingly comprehensive demands upon the Mental Health Center for information about his daughter's condition, treatment, and prognosis."...

is a distortion of the facts of the case, is misleading and unwarranted. The agreed facts are in the Record. They are that the plaintiffs were never given any written reports about the findings, diagnosis, treatment or prognosis in respect to their daughter by defendants. (R.12)

At the same time, plaintiffs informed the defendants that the child was showing all of the same symptoms after discharge that had been the basis of her hospitalization in the first place. (R.49) Plaintiffs were obviously deeply concerned and had an immediate need to know the information that they were requesting. But all that they got from defendants was the basic information that plaintiffs themselves had given to defendants (Complaint pars.19,22, 24 and Exhibit D; R.10-12,51). Respondents' statement suggests no reason for the demands, and makes them appear unreasonable.

Respondents also misstated the facts of this case (R/B 10) by the representation:

> "However, since the validity of the original consent was disputed. ..."

This is a gross misrepresentation of the facts of this case. The undisputed facts are that JANE signed a consent form (R.62) supplied by defendants, which was accepted as a consent form (R.63) by

defendants. The consent was never disputed. Instead, defendants claimed that they had the power to overrule and disregard the consent and the pertinent statute, on the basis of their own discretion. (Complaint pars. 46-50; R.22-23, 65, 66). The Massachusetts Supreme Judicial Court held that defendants did not have that power where there was a valid consent. The original consent existed. The Supreme Judicial Court simply refused to give it effect, nunc pro tunc, because JANE had become of legal age.

Finally, respondents fail to deal with the issue of fact that is undisputed, that all of the efforts of the parents to obtain reports and information were intended to help them care for and prevent injury to JANE, not to themselves. The plaintiffs' injury occurred when they were finally deprived of the parental right to care for JANE while the defen-

dants were still holding to their continuing refusal to help them do so. Plaintiffs' injury occurred later.

Reply to Respondents' Principal Arguments

There are two issues concerning the applicable statute of limitations applied by the court of appeals. Was it the right limitation period, and when did it begin to run? Both depend on the undisputed facts. Construing those facts as they appear in this case, this Court can decide that the relationship between plaintiffs and defendants was contractual, with plaintiffs' damages being consequential but totally foreseeable by defendants, who were professional bound to foresee them. This Court can also decide that the claims arise in tort, and on the facts can decide that plaintiffs were not bound to foresee their own injury resulting from a lost relationship with their child, in which case under Massachusetts law,

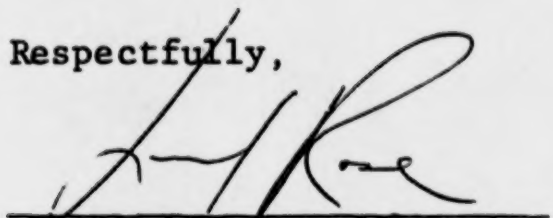
already cited in the petition, the applicable three-year statute of limitations period did not begin to run until 1977, less than three years before they brought their cause of action under 42 U.S. Code 1983. In either case, the limitations period has not yet run, and the defense is not sustainable.

Summation

Most parents do not have the resources to litigate their constitutional rights as parents when they are faced with the power of the State and of State-run hospitals. The parents of minor mental patients are further handicapped by the tremendous task of trying to care for their children while seeking to enforce their rights in order to carry out their responsibilities. This case sets forth major issues clearly; issues which will clarify the constitutional rights of parents, who sorely need that clarification from this Court.

Petitioners pray that their petition may be granted.

Respectfully,



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